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THE LANGUAGE OF THE LAW
BY DAVID MELLINKOFF





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Corporations.

(A) Of the Nature and different Kinds of Corporations.

(B) By whom, and in what Manner created.

(C) Of the Names of Corporations.

1. Of the Name in its Creation.
2. How far it may be varied from in Grants by or to a Corporation.
3. How far it may be varied from in Pleading and Judicial Proceedings.

(D) What Things are incident to a Corporation.

(E) How Corporations differ from natural Persons.

1. Of Grants made by and to them.
2. How they are to sue and be sued.
3. What Things they may do without Deed.
4. What Things they may take in Succession.
5. Where they shall be liable in their natural Capacities.
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7. Of the Concurrence required in corporate Acts;
8. Of the Regularity of their Proceedings.
9. Of the Election and Amotion of the Members.

(F) How they are visited.]

(G) Of the Dissolution of Corporations.

(A) Of the Nature and different Kinds of Corporations.

CORPORATIONS are of several natures, all of them instituted for the better government of a people combined together, and living under a regular system of laws.

10 Co. 29. b.

31. b.

1 Roll.

Abr. 512.

[(a) The

use of the

institution of a sole corporation is pointed out by Sir W. Blackstone, in 1 Comm. 469, 470. But his successor in the Vinerian chair thinks, "that it might have been better to have given sole corporations some other name. For, except the incapacity of purchasing in mortmain, very few points of corporation law are applicable to them. The power of making valid bye-laws, the right of electing new, and of removing old members, and the necessity of a common seal, as well as other matters, have little or no relation, except to corporations aggregate." 1 Wooddes. Sytt. 471, 2.] (b) Who is a corporation sole by the common law, and has thereby several privileges and prerogatives distinct from a common person, for which *vide tit. Prerogative*. (c) These are founded by the king, and are under ecclesiastical government; yet the common law takes notice of them, though not originally. (d) If he holds his possessions singly, he is a corporation sole; but if with others he makes a chapter, he is thereby member of a corporation aggregate; so, the same person by being incumbent of the same preferment may be both a corporation sole, and a member of a corporation aggregate. Comp. Incumb. 372.

4 Mod. 54.

Carth. 217.

Show. 280.

(e) And is

said to be

invisible and

immortal,

and can only

be created by act of parliament, or the king's charter; for though some corporations are said to be by prescription, yet such prescription always supposes an original grant from the crown, which being lost, or worn out by time, yet having run out into a prescription, still continues to unite them. 45 E. 3. 2, 3. Co. Lit. 130. 2 Bulst. 233. *Vide* in the argument of *quo warranto* against the city of London, 115. Kelw. 138.

Co. Lit.

250. a.

3 Inst. 202.

(f) Those

Also corporations are said to be ecclesiastical or lay; of ecclesiastical corporations some were called (f) *regular*, as abbots, priors, &c. others *secular*, as bishops, deans, &c. lived under certain rules, and had vowed true obedience, wilful poverty, and perpetual chastity; but are now dissolved. Co. Lit. 93.

(g) Which

by the civil

law are

called col-

leges or uni-

versities, yet

are con-

sidered as lay

corpora-

tions.

Of lay corporations some are said to be for general government; as those of mayor and commonalty, &c.; some for a particular purpose, as for the advancement of (g) learning, (h) charity, or some (i) particular trade or branch of business: these receive their sanction from the crown, and must be by the king's licence; though a private person may be founder, and may give them laws to which they must square themselves in their future conduct. Carth. 92. [The corporations of the universities of this country are lay corporations. 3 Burr. 1647. 1 Bl. Rep. 547.] (b) Such are hospitals. (i) As *Trinity-house* for regulating navigation, *South-Sea Company*, &c. *Vide tit. Mandamus*.

(B) By whom, and in what Manner created.

THE king, by virtue of his prerogative, is the (a) only person [1 Bl. Com. 472, 3.] that can erect either an (b) ecclesiastical or (c) lay corporation. (a) The pope could

not have founded or incorporated a college, &c. here, but it ought to have been done by the king himself. 4 Co. 107. b. (b) 5 Co. 26. a. Cawdry's case. (c) 49 E. 3. 4. 49 Aff. 9. Bro. Prescription, 12. 10 Co. 33. b.

Yet the king may give power to a common person to name the corporation, and the persons it is to consist of; but when he hath so done, this corporation does not take its essence from the common person, but from the king. 10 Co. 33. b.

Also by the 39 Eliz. cap. 5. every person seized of an estate in fee-simple, may by deed enrolled in the high court of Chancery erect an hospital or house of correction, which shall be incorporated, and have perpetual succession, and shall be visited by such persons as shall be nominated by the (d) founders thereof, &c. Vide 2 Inst. 720., this statute expounded. (d) By the common law, he that

gives the first possession to the corporation, is the founder. 38 Aff. 22. 50 Aff. 6. Bro. Corrody, 12. 1 Co. 33. b. — But if the king and a common person give possessions to a corporation at one and the same time, the king only shall be the founder by his prerogative. 5 Aff. 6.

In the creating of a corporation, the law does not seem to require any set form of words to be made use of, as *incorporo, fundo, erigo*, &c. but any words (e) equivalent will be sufficient. 10 Co. 30. Style, 198. (e) As *constituimus* the men of such a town a corporation, viz. mayor, &c. 2 Roll. Abr. 157.

The king may grant to the commonalty of D. that they shall be incorporate by the name of mayor, &c. and that they may choose a mayor, &c. and this is a good corporation, though the election of a mayor is *in (f) futuro*; for there is a diversity between a power, liberty, franchise, or other thing newly created, which may take effect *in futuro*, and an estate or interest which none can take without a present capacity. (f) By a special act of parliament it was enacted, that there may be built one meeting-house, &c. that the

same may be called, &c., and the lord, &c. may be governors, &c., and the said governors, &c., shall for ever hereafter be incorporated, &c., it was resolved, that no hospital was incorporated by this act, because all the words are *de futuro*. 10 Co. 24. 5.

A patent procured by some few persons only, shall not (g) bind the rest; nor (h) can the inhabitants of a town be incorporated without the assent of the major part of them. (g) Roll. Rep. 226. (h) 2 Brownl. 100.

As it is the king's charter that creates corporations, so such charter (i) may mould and frame them as it shall think fit. 3 Mod. 13. (i) Of ancient time,

the inhabitants of a town were incorporated when the king granted to them to have *guildham mercatoriam*. Reg. 219. 10 Co. 30.

If the king grants lands to the men or inhabitants of D., *hereditibus & successoribus suis*, rendering (k) rent; (l) for any thing touching (m) these lands, (n) this is a corporation, but not to other purposes. 21 E. 4. 56. 7 E. 4. 3. 2 H. 7. 13. (k) If the king grants *hereditibus* to purchase. 21 E. 4.

de Iffington to be discharged of toll, this is a good corporation to this intent, but not to purchase. B 2

21 E. 4. 40.—Where the king, in giving lands to the inhabitants of a town, on a supposition that they were incorporated, shall be said to be deceived in his grant, and the grant void. 1 Roll. Abr. 513. Co. Lit. 3. a. Lane, 21.—By the forest law, a grant of a privilege within a forest, to all the inhabitants, being freeholders within this forest, is good. 4 Inst. 297. (l) By this they have capacity to take, but not to grant the lands to a other. Cro. Eliz. 35. (m) Where a charter made to aliens may incorporate them *proad* the king, and not *quoad* others. Roll. Rep. 143. 276. (n) But if the king releases the rent, the corporation is *ipso facto dissolved*. Dyer, 100. pl. 70.

10 Co. 31. One corporation may be made out of another; but it must be
49 E. 3. 4. by the king's charter; therefore where the mayor and commonalty
49 Aff. 8. of London prescribed to make another corporation in the city,
Mou, 584. of London prescribed to make another corporation in the city,
Sid. 291. though their customs are confirmed, yet it was holden not to be
2 Keb. 52. good, without the king's charter.
63. 88.

Salk. 102. pl. 5. [But the city of London may make a fraternity or fellowship, the members of which may assert their claim of privileges under the preceptive right of the mayor and commonalty to erect such a company. *Fazakerney v. Wiltshire*, 1 Str. 462.]

(C) Of the Names of Corporations: And herein,

1. Of the Name in its Creation.

5 E. 4. 207. THE names of corporations are given of necessity; for the name
Leon. 307. is, as it were, the very being of the constitution; for though
Dyer. 106. it is the will of the king that erects them, yet the name is the
11 Co. 21. knot of their combination, without which they could not perform
Perk. 8. their corporate acts; for it is no body to plead and be empled,ed,
27 H. 6. 3. to take and give, until it hath (a) gotten a name.
2 Keb. 52.
Lit. 201.
11 Co. 20. Owen, 35. Dalif. 78. (a) 2 Bendl. 2. 10 Co. 23. 2 Inst. 666., that the name of a
corporation is as the name of baptism.

The names of corporations are usually taken, first, from the persons of which they consist; secondly, from the use and design of their being; thirdly, from the names of the patrons that first procured their institution; fourthly, from the place where they reside; fifthly, from the names of saints.

Salk. 191. But though a corporation must have a name, yet that must be
pl. 3. understood to be either expressed in the patent, or implied in the
Per Holt, nature of the thing; as, if the king should incorporate the inhabitants
Ch. Just. of Dale with power to choose a mayor annually; though no name be given, yet it is a good corporation, by the name of mayor and commonalty. So, the city of *Norwich* is incorporated to be a mayor and sheriffs, by the charter of *Henry* the Fourth, and are called mayor, sheriff and commonalty.

21 E. 4. 59. Also, the king may incorporate a town by one name, and after
Fitz Grant, by another name, and then they shall use their name according
30 S. C. to their second corporation; and (b) yet they shall continue their
[See *ac*.] (c) possessions they had before by the other name.
Knight v.
Mayor, &c.

of Wells, 1 Ld. Raym. 80. 1 Lutw. 508. S. C.—But with respect to the extinction of the old name by a new charter, Holt, C. J. took this distinction; where the new charter alters the constitution of the corporation, and new models it, there they shall lose their old name; but if the constitution as to all its integral parts remains the same, though the new charter give them a new name, the old one remains. As, if a mayor be added, or a mayor and masters be made mayor and aldermen, or an abbot and convent a dean and chapter; there they lose their old name, because new integral parts of the corporation are added.

added. But if the bailiffs and burgeses *villæ de Gippo*, accept a charter constituting them bailiffs and burgeses *villæ Gipwici*, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts. *Regina v. Bailiffs, &c. of Ipswich*, 2 Ld. Raym. 1237. 2 Salk. 433. S. C.] (b) So, a debt to the corporation remains, though their name is changed by a new charter. 3 Lev. 238. (c) And all other franchises and privileges. 4 Co. 87. b.

So, a corporation may be incorporated by one name, and power given them to sue and purchase lands by another name. Jones, 261. College of Physicians

and Butler. Lit. Rep. 168. 212. 350. Cro. Car. 236. S. C.

The college of physicians were incorporated by the name of the president, college or commonalty of the faculty of physick; and afterwards in the patent it was granted that the president of the college should sue and be sued in behalf of the college. The college brought an action against Dr. *Salmon*, upon the statute for practising without licence, under the seal of the college; and declared by the name of the president and college, or commonalty; and the court allowed to sue by either; and so, were the precedents; for though it was a rare instance that the corporation should be incorporated by one name, and have leave to sue by another name; yet when it is so, it is proper. 5 Mod. 327. College of Physicians v. Dr. Salmon, 2 Salk. 431. S. C. pl. 2. Ld. Raym. 620. S. C.

2. How far the Name may be varied from, in Grants by or to a Corporation.

Although the names of corporations are not merely arbitrary sounds, yet if there be enough said to shew that there is such an artificial being, and to distinguish it from all others, the body politick is well named, though the words and syllables are varied from; and this the rather in grants, which are to have a favourable construction. 10 Co. 125. Gouldf. 122.

So, if the name be expressed by words (a) synonymous, it is sufficient; as if a college be instituted by the name of *guardianus & scholares domus sive collegii scholarium de Merton*, and they make a lease by the name of *custos & scholares*, it is good. 10 Co. 125. (a) So, if the grant be made by *pæfatus & scholares*,

where it should be *scholares*, it is good. 11 Co. 20. — So, if J. S. abbot of B., makes a lease, by the name of *J. S. clericus de B.* 11 Co. 21.

If there be a corporation founded by the name of *mayor and burgeses burgi dom. regis de Lynn Regis*, and an obligation is made to them by the name of *mayor and burgeses de Lynn Regis*, without saying *burgi dom. regis*, it is well enough; for the parties are sufficiently expressed; and all boroughs are founded by the king. 10 Co. 125. The case of the Mayor and Burgeses of Lynn Regis.

If a house be founded by the name of *minister dei pauperis domus*, and a lease be made by the name of *minister pauperis domus dei*, this is well enough; for the same design is specified by both names. Hob. 124.

But if a house be founded by the name of *guardianus & scholares domus sive collegii scholarium de Merton*; and a lease be made by them, by the name of *guardianus & scholaris domus sive collegii de Merton*, it is a material variance of the name, since they have not expressed the design of the house, which is a substantial part of the name. 10 Co. 125.

11 Co. 20.
Arras's
case.

But if a college be instituted by the name of *aula scholarium regine*, to be governed by a provost, and they are confirmed by the king, by the name of *præpositus & scholares aule regine*, and they make a grant of an advowson by that name, this is good; for that college would never have a name according to the words of the first charter, for then it would be a sole corporation, which is contrary to the general convenience of such a body, for the name would be *præpositus scholarium aula regine*, which cannot be intended, and the word *scholares* is not required as in the former case; and the placing it where it is confirms the establishment; and this confirmation of the king, and common appellation, are good interpreters of the original intent of the name.

Co. 124.

Edward the Fourth incorporated the dean and canons of *Windsor*, by the name of *The King's Free Chapel of St. George the Martyr*; and in the time of *Philip* and *Mary* they made a lease, by the name of *The Dean and Canons of the King's and Queen's Free Chapel, &c.* this was holden a material mistake of the name; for it takes its name from the founder, that is here mistaken, and the name of a different person substituted in his room.

Poph. 57.
(a) A corporation must be named of such a place as will distinguish its situation from others. *Vide* 10 Co. 29. b. 32. b. 2 Brownl. 244. And. 196. Roll. Abr. 513.

If a corporation be founded by the name of the dean and chapter of the cathedral church in *Oxford*, and they make a lease by the name of the dean and chapter of the cathedral church in the university of *Oxford*, this is well enough; for the (a) place of the situation is well and sufficiently shewn.

10 Co. 124.
(b) So, if a corporation be instituted in honour of *St. George the Martyr*, and in the lease they omit the word *martyr*, it is well enough; for the name of dedication is but an empty sound, and no otherwise requisite than to distinguish the corporation from all others.
Poph. 59.

If the prior of *St. Michael of Coventry* makes a lease by the name of *The Dean of Coventry*, this is good; so (b) if the convent grant an annuity or corody, and the name of the saint be omitted.

Cro. Eliz.
816.

If there be an immaterial addition, this does not hurt; as if *the president and scholars of Corpus Christi college in Oxford* make a lease by the name of *president and scholars of Corpus Christi college in Oxon, com. Oxon*, this is good; for *utile per inutile non vitiatur*.

Master, &c.
of Suffex
and Sidney
College v.
Davenport,
1 Will. 184.

[If a bond be given to *A. B.* (master) and the fellows and scholars of *Suffex* and *Sidney college*, to be paid, &c., to the master, fellows and scholars; this is a bond to the master, &c., in their corporate capacity, and not to the master, whose name is mentioned in the beginning of the bond, in his natural capacity.]

Leon. 307.
Dyer, 106.
11 Co. 21.
Perk. 8.
Owen, 35.
Dalif. 78.

In devises, if the name of the corporation be mistaken, yet if there be words sufficient to shew that the testator could only mean and intend such an one, it will be sufficient; as a devise to *George Bishop of Norwich*, when his name is *John, &c.*

Hob. 33.
19 H. 8. 8.

But if a devise be to the abbot of *St. Peter*, where it is really the abbot of *St. Paul*, the devise is void; for here the saint's name is the only specification of the party in the devise, which is mistaken.

3. How far it may be varied from in Pleading and Judicial Proceedings.

There is a difference between writs, declarations, &c., and obligations and leases, &c., for if the name of a corporation be mistaken in a writ, a new writ may be purchased of common right; but if it were fatal if mistaken in obligations and leases, the benefit of them would be wholly lost; and therefore one ought to be supported, though not the other; as (a) where *John Abbot of N.* granted common of pasture to *J. S.* by the name of *William Abbot of N.* this was holden good; but if this name had been thus mistaken in a writ, it had been fatal.

the name of *præfati guardiani & socii*, and held ill. 2 Bulst. 233. Tipling and Pexal, and 11 Co. 21. —In pleading a lease by a dean and chapter, the name of the dean must be shewn. Co. Lit. 3. a. [But see 1 Leon. 307. Dy. 86. a. in marg. and *infra*.]

There is also a difference between an ancient corporation and a corporation newly erected; for an ancient corporation, by use, may have a special name differing in substance, but otherwise of a corporation created within memory; for this regularly can only have the name by which it is instituted.

Dyer, 279. 3 Mod. 6. Cro. El. 331.

If the advowson of popish recusants convicted be given to the chancellor and scholars of the university of *Oxford*, and they bring their action by the name of the chancellor, masters and scholars of the university of *Oxford*, this is well brought; for a corporation by act of parliament may take by another name than that by which it was instituted; for in acts of parliament, the subject and design of the legislature must be respected; and those that have the power wholly to change the name, have certainly power to alter it in any act of theirs; and all inferior jurisdictions are bound to support the sense of the law.

A parson must be empleaded by christian and surname, and not *John*, parson of *D.* &c. but in other sole corporations, the christian name only is sufficient; as *John*, Bishop of *Canterbury*; *Thomas*, Abbot of *D.*, &c.

But where the corporation is aggregate of many capable persons, as mayor and commonalty, dean and chapter, &c. none of them in pleading are named by their proper christian and surnames; and the reason is, because, in the first place, the death of the individual is a good plea in abatement, for a new successor comes in his place, that was not party to the former writ; but bodies aggregate are immortal and invariable; and therefore the parties to the first writ are always the same.

If a writ is brought by the (b) warden and college of *All Souls*, for lands, &c., *quod clamant esse jus & hereditatem suam*, this is well enough, though it is not said *jure collegii*; for they have no other capacity.

son pleads he was seised, he must say *jure ecclesiæ*, for that he hath two capacities; *secus* of an abbot, dean, and chapter, &c. Leon. 153. per *Anderfon*. —So, in case of a bishop, it must be shewn *quo jure*. 2 Lev. 68. Vent. 223. —Where it cannot be alleged that a man was seised *jure presbyteratus*, but

6 Co. 65.

(a) A corporation was instituted by the name of *præfati & guardianorum naupe-gor. de Rederiffe*, and an action brought by

and 11 Co. 21.

Co. Lit. 3. a. [But

Hob. 211.

Noy, 54.

2 Brownl.

292.

Latch. 229.

11 Co. 94.

Cro. El. 331.

10 Co. 87.

Chancellor

of *Oxford's*

case.

2 Inst. 666.

Yelv. 34.

49.

2 Inst. 666.

Skin. 2.

pl. 2.

Cro. Eliz.

232.

Leon 153.

And. 272.

S. C.

(b) If a par-

son

but

but ought to be *jure cantuariæ*, *vide* Cro. Car. 215.—If a dean and chapter, being parsons *imparsones* of the church of *D.*, demand the whole church, &c., they shall say they were seized *jure ecclesiæ de D. Plow.* 503.

Cro. Car.
574. Heal-
ing and the
Mayor of
London.

Where the corporation were named by their name, which was afterwards mistaken; as where judgment was given in an action of debt, that the mayor or commonalty and citizens should recover the debt and 6*l.* costs *civilem major. communitati* adjudged (omitting *civibus*); it was holden to be error: but afterwards upon motion in *C. B.* and upon examination of the doggett-roll (where it was well entered) it was awarded to be amended.

Turvill v.
Aynsworth,
2 Str. 787.
2 Ld. Raym.
1515. Rex
v. Croke,
Cowp. 26.

[However, in legal proceedings, any variation from the true name of a corporation is fatal, even though the corporation be not a party to the proceedings. As where in an action on a South-sea contract, the plaintiff declared it was for stock in the company trading *ad maria Australiæ, Anglicè vocat.* the South-sea company. Again, an act of parliament gave power to the justices of the county of Surry, at their quarter sessions, on the application of "the mayor, aldermen, and commons of the city of London" in common council assembled, to issue a precept to the sheriff to summon a jury to inquire into the value of certain estates: an order was made by the justices at their quarter sessions, stating, that on the application of "the mayor, and commonalty, and citizens," they issued a precept, &c.: this order being removed by *certiorari* into the King's Bench, it was objected, that it stated the application to have been made by *the mayor, commonalty, and citizens*, instead of the *mayor, aldermen, and commons*, according to the directions of the act. The court allowed the objection, for that the bodies described in these different terms were distinct, the one being a select body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile such distinction, or to shew that in truth the former were the proper persons.]

(D) What Things are incident to a Corporation.

3 Mod. 13.
Roll. Abr.
513

(a) That
when a cor-
poration is
duly created,

all other incidents are tacitly annexed. 10 Co. 30. b., that it is incident to sue and be sued, to purchase and sell; but *vide* tit. *Mortmain*, and 10 Co. 30. Roll. Abr. 515. Hob. 211.

10 Co. 31.
Hob. 211.
Moor, 584.
5 Mod. 436
(b) That
every by-
law, by
which the

A Corporation is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations, beyond which it cannot regularly proceed: yet there are some things (a) incident to a corporation, which it may do without any express provision in the act of incorporating.

As if the king creates a corporation, and does not give any express power in the letters patent to make laws, yet this power is incident to the corporation, and included in their incorporation; for a body politic cannot be governed without laws; but these by-laws (b) ought always to be subject to the laws of the realm, as subordinate thereto.

benefit of the corporation is advanced, is a good by-law, for that very reason, that being the true touchstone of all by-laws. Carth. 482. *per* Holt, *vide* tit. *By-Laws*.

Ancient

Ancient corporations have, as incident to them, a power of (a) electing members; but in newly erected corporations, the charter that gives them being, must provide for their continuance and succession.

a mayor and eight aldermen, with a clause in the patent, *quod super mortem vel remotionem aliquis aldermanni liceat majori & ceteris aldermannis infra octo dies proximo post mortem vel remotionem, &c.* to elect another alderman into his place, though no election be within eight days after the death of an alderman, yet they may elect an alderman at any time after. Roll. Abr. 513, 514.

[So, corporations have as incident to them a common seal. For a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, (b) which unites the several assents of the individuals, who compose the community, and makes one joint assent of the whole.]

books, though not under the corporate seal, will be decreed in equity. *Maxwell v. Dulwich College*, 14th July 1783, cited in *Fonbl. Eq. Tr.* 296. But see *contr.* *Taylor v. Dulwich College*, 1 P. Wms. 655.

If a corporation be created of a mayor and eight aldermen, with a clause in the patent, that if any of the aldermen die, or be removed, that it shall be lawful for the mayor, and the rest of the aldermen, within eight days after the death or removal, to elect another in his place, though it is not limited that they, or the greater number of them, may elect, yet the greater number may elect.

And if in the above case the mayor, at the time of the death of an alderman, be absent from *London* till after the eight days, and the aldermen, within eight days, come to the deputy, and require him to make an assembly of them to elect another within the eight days, and he refuse, and thereupon the greater part of the aldermen assemble themselves without the mayor or his deputy, and elect an alderman; this is a void election, for the mayor (c) ought to be present at it, by the words of the grant.

who ought to preside, wilfully or accidentally absents himself, by the 11 Geo. 1. c. 4.

1705, D.

Also where a charter impowers a corporation to choose officers, it impliedly obliges the persons chosen to undergo and to stand to the nomination; for by accepting any letters patent, there is an obligation on the parties accepting to perform all things thereby required, as to undergo all charges, offices, &c.

Corporations have also divers franchises, &c., as felons goods, waifs, estrays, treasure-trove, deodands, courts and cognizance of pleas, return of writs, fairs, markets, exemptions from serving in offices or on a jury, exemptions from payment of toll, the assise of bread and beer, a pillory and tumbrel, the office of a justice of peace, coroner, clerk of the market, &c. but these must be mentioned in the charter, and granted by express words.

12 Co. 120.
3 Mod. 14.
(a) If the king creates a corporation of

1 Bl. Com. 475. Dav. 44. 48.
(b) The agreement of the major part of a corporation being entered in the corporation-

Roll. Abr. 515.
Godb. 439.
& vide the statute 33 H. 8. c. 27.

Roll. Abr. 515.
(c) But for this vide 3 Mod. 15. and how it is now remedied where the mayor, or other officer,

Vide *Manda-*

5 Mod. 440.

14 H. 8. 5.
19 H. 6. 52.
39 E. 3. 35.
Lev. 159.
Keb. 840.
Raym. 113.

5 Mod. 440. And if there be letters patent, which grant to the body politick
 6 Mod. 52. an exemption from tolls or privileges of fairs, (a) commons, &c.
 (a) But a corporation all the particular members shall take advantage of these grants.
 of a town cannot prescribe for the freeholders of the town. 2 Keb. 25.

[Here it may be observed, that corporations, in the character of owners or occupiers of houses or lands, are subject to the same] (E) How Corporations differ from natural Persons :
 And herein,

1. Of Grants made by and to them.

ALTHOUGH a corporation aggregate is said to be invisible, immortal, and to exist only in supposition and intendment of law, yet such an artificial body are by their creation (b) capable of (c) purchasing and parting with their possessions. burthens, to which individuals are subject in the same character. They are *inhabitants* within the purview of the statute of 22 H. 8. c. 5. for the repair of bridges. 2 Inst. 703. They are liable to be rated to the poor within the 43 El. c. 2. in respect of lands whereof they are seized in fee for their own profit. *Rex v. Gardner*, Cowp. 79. They are rateable to the repairs of a church in respect of their corporate lands. *Thursfield v. Jones*, Sir T. Jones, 187. So, they may be bound exclusively to the repair of a highway, or of a bridge, or creek, by reason of the tenure of certain lands : so, they may be compelled to do so by force of a general prescription, that they ought and have been used to do so from time immemorial, without an allegation that they used to do so, in respect of the tenure of certain lands, or for any other consideration ; because a corporation aggregate, in judgment of law, never die, and therefore if they were ever bound to such a duty, they must continue to be always so ; neither is it any plea that they have always done it out of charity ; for what they have always done, they shall be presumed to have been always bound to do. 2 Inst. 700. 1 Hawk. P. C. c. 76. § 3. *Mayor of Lynn v. Turner*, Cowp. 87.] 45 E. 3. 2. 3. (b) Such corporations are not capable of a protection *profectur.* or *mortuar.*, because the corporation itself is invisible, and resteth only in consideration of law. Co. Lit. 130. 2 Bulst. 233. — It hath not been known that a corporation hath been bound in a recognisance or statute-merchant. *Moor*, 68. pl. 182. — They cannot do homage or fealty, because these must be done in person. Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b. (c) But they cannot retain, without a due licence in *mortmain*. Co. Lit. 99. *vide tit. Mortmain.*

21 E. 4. 12. But a dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or grant, or make any contract that will bind the corporation.

[So, *e converso*, a bond or contract entered into by the body in the absence of the head, will not bind ; and upon this principle, if a bond be extorted from a mayor and commonalty by the imprisonment of the mayor, the corporation may plead that imprisonment in avoidance of the bond, for during the imprisonment, the corporation may be considered as without a head. 21 E. 4. 12. Cowp. 224. 226.]

Id est tit. Remainder and Reversion. If a remainder be limited to such a corporation as the king shall next erect, this is no good remainder, though a corporation be erected before the particular estate determine ; for though a remainder limited to the eldest son of J. S. in such a manner be good, yet this body of men is only capable of taking when they are *in esse*.

Co. Lit. 9. If a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, (d) because in judgment of law they never die. (d) So, if lands are given to the king by deed enrolled, without the word *successors* or *heirs*, a fee-simple passeth. Co. Lit. 9.

If a lease be made to a corporation aggregate for the life of the lessor, this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance; but if a lease be made to a corporation aggregate for their own lives, this is no estate for life, but a fee-simple; for the lease being made to them as a body politick, which hath a continued succession, and never dies, a lease made to them during their lives, is equal to a grant made to them while they continue a body politick, which, by reason of the perpetual succession of its members, is in law looked upon to be for ever.

A corporation cannot be seised to the (a) use of another; and therefore it is said, that if one by licence, without a valuable consideration, make a feoffment, levy a fine, or suffer a recovery, or the like, to a corporation, to the use of J. S., the corporation shall have it to their own use.

Pl. Com. 102. 538. (b) That is, by the strict rules of the common law; for corporations are in point of fact frequently made trustees for charitable use, and are compelled in equity to perform the trusts. But the doctrine in the text still holds with respect to the king. Gilb. *ubi supra*.

If A. grants to the mayor and burgesses of D., the moiety of a yard-land, in the waste of ———, without describing in what part it should be, or how it is bounded, the corporation cannot make their election by attorney; but are first to resolve on having the land, and then they make a special warrant of attorney, reciting the grant to them, and in which part of the said waste their grant should take effect; and according to such direction the attorney is to enter.

2. How they are to sue and be sued.

Corporations aggregate must sue and defend by (c) attorney; and therefore the (d) proper process against them is a *disfringas*.

effoined. Dalf. 121. pl. 154. Ld. Raym. 79. Argent v. Dean and Chapter of St. Paul's, B. R. E. 23 G. 3 cited in 2 Term Rep. 6.—cannot be outlawed. 10 Co. 32. b.—No attachment lies against a corporation. Raym. 152.—[1 H. Bl. 207. If they have neither lands nor goods, there is no way to make them appear, either in a court of law or equity; for it is a rule, that for a public concern, the sheriff cannot distrain any individual member of a corporation. Thursfield v. Jones, Skin. 27. 1 Vent. 351. Style, 367. *contra* all cited Cowp. 85. But in an extraordinary case, where they have no property, and will not appear, and where, consequently, a court of equity can give no relief, the plaintiff may apply to the House of Lords, who will make a specific order for relief. 1 Ch. Ca. 204. 2 Vern 396. S. C. cited.] (d) Where on such process the court will order the sheriff to return good issues. Salk 191. pl. 2.

After service of a writ of execution of a decree against a corporation, the next process is a *disfringas*, and after that a *sequestration*, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *disfringas*, which issues for that very purpose to compel them to appear; but the appearing being past, the process must go, because the appearance being only in favour of liberty, can be of no service to a corporation, which cannot be committed.

A corporation aggregate cannot distrain in their own persons, but by their bailiff, and therefore no (e) replevin lies against them by the name of their corporations.

in custodia mariscalii. 6 Mod. 183. [Cannot sue as a common informer. 2 Stra. 1241. marg. The

21 E. 4. 76.
Roll. Abr.
843.

Co. 122.
126.
[(c) Gilb.
Uses and
Trusts, 5.
170.
Jenk. 195.

Leon. 30.

Co. Lit. 66.
(c) They
cannot be

2 Vern. 396.
Preced.
Chan. 128.

Brownl. 175.
(e) Cannot
be declared
against, as
The

The summons to appear must be served on the mayor, or other chief officer, and that is sufficient. Pr. Ch. 131. 1 Ch. Ca. 206.]

10 Co. 32. a.
Skin. 27.

[It is holden that a corporation aggregate cannot be summoned into the ecclesiastical courts: they may, however, be made amenable to those courts: for in the court Christian they are cited by their proper names, though in their *politick* capacity; and if they stand out, they must lie by the heels in their *natural* capacity.

22 Aff. p. 67.
Bro. Corpor.
p. 43.

A corporation which has a head cannot sue or be sued without it, because without it the corporation is incomplete.

(a) Plowd.
102. 3.
Dy. 102.
2 Lev. 68.
(b) 1 Leon.
153.
(c) Cro.
El. 232.
1 Anderf.
272.

A sole corporation, having two capacities, a natural and a corporate, must always shew in what right he sues (a): but an aggregate corporation having only a corporate capacity, a suit in their corporate name can be only in that capacity; and therefore, it is not necessary that a mayor and commonalty should allege seisin in right of the corporation (b), or a warden and scholars, seisin in right of their college (c).

Hob. 211.
2 Ld. Raym.
1535.

In an action of whatsoever kind, brought by a corporation, it is unnecessary to shew how they were incorporated; but on the general issue pleaded by the defendant, it is said, they must prove that they are a corporation.

Dutch We.
India Com.
pany v.
Henriques
VanMoyes.
2 Ld. Raym.
1535.
1 Sir. 612.

★ An action may be supported in this country by a foreign corporation, in their corporate name and capacity; and in pleading it is not necessary they should set forth the proper names of the persons who compose the corporation, or shew how they were incorporated; though on the general issue being pleaded, they must prove that by the law of the foreign country they were effectually created a corporation.

Pitt. v.
Guinee,
1 Ld. Raym.
558.
1 Salk. 10.

But in justifying a trespass committed in the assertion of a franchise or privilege of a corporation, it is frequently necessary to shew not only the existence of a corporation, but the manner in which it claims to be so, whether by charter, prescription, or act of parliament.

Anon.
1 Vern. 117.
Wych v.
Meal, 3 P.
Wms. 310.

In equity, corporations aggregate answer under their common seal, and not upon oath: as therefore it is not very likely that they will discover any thing to their prejudice, it is usual for plaintiffs to make the clerk or treasurer, or some of the principal members in their natural capacity, co-defendants with the corporation. This practice appears to have commenced in the time of Charles the Second, and was afterwards expressly recognised by Lord Talbot.

Mordam v.
Morton,
1 Br. Ch.
Rep. 471.

When a person has reason to suspect that he has sustained an injury by persons acting under the authority of a corporation, but cannot ascertain how far they are concerned, he may file a bill against them and their secretary, or other officer, for a discovery, before he brings an action at law, suggesting that he intends to bring one, but cannot do it, without the discovery prayed; because as the suit against a corporation is by original, the discovery may be necessary before he can sue out his writ. But if the discovery of any of the matters called for would be prejudicial to the corporation,

155 & 156 Title "Corporations" can cover these cases

ration, and not be necessary to the plaintiff's case, the officer needs not discover those parts.

If the majority of the members of a corporation are ready to put in their answer, and the head who has the custody of the common seal, refuses to affix it, a court of equity will stay the process against the corporation, 'till an application can be made to the court of King's Bench for a mandamus to compel him, which that court will grant.]

R. v. Dr.
Wyndham,
Cowp. 377.

3. What they may do without Deed.

Aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore gifts (a) by and (b) to them, (c) must be by deed.

170. 2 Sand. 305. Raym. 194. (a) They cannot attain without deed. 6 Co. 38. b. (b) A gift to a dean and chapter, or other corporation aggregate, must be by deed. Co. Lit. 94. b. — But an abbot, bishop, parson, &c., or other sole body politic, might have been infeoffed without deed. Co. Lit. 94. b — (c) Where it is pleaded, the thing is done, it must be intended by deed. Cro. Jac. 411. 2 Saund. 305.

Co. Lit.
94. b.
6 Co. 38. b.
Cro. Car.

A corporation aggregate cannot, without deed, command their bailiff to enter into certain lands of their lessee for years, for a condition broken.

2 Roll. Abr. 699. S. C. Cro. Jac. 411. Cro. Car. 269.

[Neither can they, without deed, appoint one to seize goods as forfeited to the use of the corporation.]

Roll. Abr.
514. Cro.
Eliz. 815.
Horne v.
Joy,
1 Ventr. 47.
1 Mod. 18. 2 Keb. 567. cited 3 P. Wms. 424.

Nor can they, without deed, present a clerk to a living.]

13 H. 8. 12.
Bro. Corp. 83.

But a corporation may employ one in ordinary services without deed, as a butler, cook, &c. but not to appear for them in an assize, or any other act which concerns their interest or title.

Ventr. 47.
Mod. 18.

So, a man may avow the taking cattle damage-feasant, as bailiff to a corporation, without having any precept in writing.

3 Lev. 107.

Also, a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler; for it neither vests nor de vests any sort of interest in or out of the corporation.

Salk. 191.
Pl. 3.

So if the sheriff makes a warrant to a corporation that hath return of writs to arrest a man, they may by parol make a bailiff to execute it.

Moor, 55.

[The bank of *England*, or any similar corporation, may without deed, empower their servant to make promissory notes, or bills of exchange, in their name: and this is the usual practice with the bank.]

Rex v.
Bigg, 3 P.
Wms. 419.

If a lease for years be made to a corporation aggregate of many, they cannot make an (d) actual surrender thereof, but by deed under their seal.

10 Co. 68.
(d) But if they accept
10 Co. 68. b.

a new lease thereof, this is a surrender in law of their first lease.

If the churchwardens of *S.* are incorporated, &c., and the king leases, &c., to them for twenty-one years, and, in consideration of a surrender thereof, leases to them for fifty years, they may with their

10 Co. 68.

(a) A dean and chapter in their chapterhouse acknowledged a deed of grant of their lands to the king, without making an attorney. Moor, 676. held clearly by Egerton, Lord Keeper, that it might be done, as well as to put their common seal to a deed without attorney; but *vide* Leon. 184. Roll. Rep. 82.

Carth. 390. In *ejectment*, the plaintiff declared upon a demise made to him by the aldermen and burgesses of ———, without setting forth that it was by deed, or under the seal of the corporation, and on a writ of *error*, it was holden well enough; and that this being a fictitious action to try the title, the demise need not now be set out to have been by deed.

Salk. 192. If a *mandamus* be directed to the mayor and commonalty of T., the return may be made in the name of the corporation, without the common seal, or the hand of the mayor set to it; for though a corporation cannot do an act *in pais* without their common seal, yet they may do an act upon record, by which they are estopped to say it is not their act.

who is not mayor, does not make it the deed of the corporation. 12 Mod. 423.

4. What Things they may take in Succession.

Co. Lit. 46. A corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because b. Roll. Abr. 515. it is always in being.

Co. Lit. But (b) regularly, no chattel shall go in succession, in case of a 46. b. sole corporation.

Hob. 64. Dyer, 48. Co. Lit. 9. a. (b) But a sole corporation by custom may be enabled by the same custom to take a chattel in succession, as the chamberlain of London, whose successor by custom may have execution of a bond or recognizance acknowledged to his predecessor for orphanage money. 4 Co. 65. Cro. Eliz. 464. 682.

Co. Lit. Therefore if (c) a lease for years be made to a bishop and his 46. b. successors, and the bishop die, this shall not go to his successors, (c) The ornaments of but to his executors.

of the chapel of the predecessor belong to the succeeding bishop, and are merely in succession, though other chattels, in case of a sole corporation, belong to the executors of the deceased, and go not in succession. 12 Co. 105. — So, the ancient jewels of the crown shall go to the successor, and are not devisable by testament. Co. Lit. 13. b. But they may be disposed of by patent, *per* Berkley and Jones. Cro. Car. 344.

(d) 19 H. 6. If a (d) master of an house, that hath a covent and common seal, 44. Roll. recovers in an annuity, and after arrearages incur, and after he dies, Abr. 515. the succeeding master shall have the arrearages, and not the executor of the predecessor, because the executor could not make a testament.

where the successor of an abbot shall recover damages in a writ of entry, though it is otherwise in case of a bishop, and other sole secular bodies politic. 2 Inst. 286.

19 H. 6. 44. But if a parson recovers an annuity, and after arrearages incur, Roll. Abr. and after the parson dies, the executor of the parson shall have the 515. arrearages, and not the successor, because he could make a testament.

Roll. Abr. By the charter granted to the college of physicians, and confirmed 515. in parliament, the offenders in practising physick in London, Atkins and without

without admission by the college of physicians, shall forfeit 5*l.* for every month, *unum dimidium regi & alterum dimidium dicto presidenti & collegio*: on this charter it was holden, that if the president of the college recovers in debt against an offender, and dies, the successor shall have a *seire facias* to execute it, and not the executor; for the predecessor recovered it as due to him and the college.

Gardner,
Cro. Jac.
159.
Noy, 121.
Brownl. 93.
S. C.

5. Where they shall be liable in their natural Capacities.

If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consisting of a constant succession of various persons, and as a corporation, can regularly do no act without writing.

Vide tit.
Disseisin.

If a mayor, or any other member of a corporation, procure a false return to be made to a *mandamus*, they may be proceeded against in their private capacities.

Salk. 192.
Pl. 4.

If the master and wardens of the company of woodmongers enter into bond thus, *viz. noverint, &c. magistrum & guardianos, &c., teneri, &c.*, and the common seal is put thereto, and it is signed as usual, by the principal of the company, and indorsed *Sigillat. & deliberat. in presentia, &c.* and the corporation is dissolved after, yet they shall not be (a) charged in their natural capacity.

Lev. 237.
—Where a corporation granted an annuity, and was afterwards dissolved.

Vide Owen, 75. 2 And. 107. (a) Where in equity, the private members of a company were made liable to the company's debts, where the company had no goods. 2 Vern. 396.

[6.] Of the Qualifications requisite for Members or Officers of Corporations.

A quaker, who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a corporation as well as any other person, and his solemn affirmation, by virtue of 7 & 8 W. 3. c. 34. is equivalent to taking the usual oaths; for that clause of the statute which provides that no quaker, by virtue of that act, shall have any office or place of profit in the government, does not extend to the freedom of a corporation.

Rex v.
Morris,
Carth. 448.
1 Ld. Raym.
337.
5 Mod. 402.

Though it be true that where an infant is *actually* mayor, or other chief officer of the corporation, this shall not avoid the acts of the corporation with respect to strangers; because these acts are not the acts of the particular persons, but of the body corporate; yet it seems that where neither the provisions of the charter, nor the usage of the corporation, *expressly* authorise the election of an infant into a corporate office, he is not capable of being elected.

5 Co. 27.
Rex v. Carter, Corp.
220. Rex
v. White,
Ca. temp.
Hardw. 8.

Residence within a corporate town is not necessarily a previous qualification for the freedom of the corporation, and the freedom, when once obtained, is not forfeited by non-residence: but by the constitution of the corporation, whether by prescription, or the *express* words of the charter, residence *may* be requisite as a previous qualification (b): and, where that is the case, the court of King's Bench will grant leave to file an information, in the nature of *quo*

(b) 1 Barnardist. 138.
1 Salk. 374.

warranto,

1 *Id.* Raym. 426. *swarvante*, against the governing part of the corporation, for admitting persons non-resident.
 Carth. 503.

Where a man is already a member of a corporation, residence is not a precedent qualification to his being chosen to a corporate office, unless expressly required by the constitution of the borough; but though residence be not required at the time of the election, an absent person must not be chosen collusively for any sinister purpose, and if he be, the election will be absolutely void. The corporation of *Cambridge*, on the charter-day for the election of a mayor, elected a person who was an officer in the army just gone to *North America*, and without the least probability of his returning till long after the year would be expired: the electors were sufficiently apprised of the fact, at the time of the election, and soon afterwards had express notice given them of it, but refused to proceed to a new election; and it appeared they had elected this absentee for the purpose that the preceding mayor might hold over, which it was pretended he might do by ancient usage, and by virtue of a charter of *Charles the Second*. The court of King's Bench held that this was merely a colour to avoid any election at all: that the electors had chosen this person because they knew it was impossible for him to execute the office, and that the election was absolutely void.

Rex v. Heath, 1 Barnard. 416. By the provisions of a charter, residence may be required as a previous qualification for some offices and not for others.

See further on this head, tit. "*Offices and Officers*" (E) (K).

7. Of the Concurrence required in corporate Acts.

Where no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part (a), but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not (b). So, though a particular constitution require the *presence* of a majority of the *whole* number, yet the *concurrence* and *consent* of a majority of the whole is not necessary; it is sufficient that a majority of the number *present* concur (c). So, where a number less than the majority of the whole, are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole: thus, by the constitution of the city of *London*, forty are sufficient to form a court of common council, though the number of common councilmen greatly exceeds the double of that number, and a *majority* of the forty, if no more be present, bind the whole corporation. So, where it appeared that king *Edward the Sixth*, by charter, incorporated twelve persons by name, to elect a chaplain for the church of *Kirton*, in *Lincolnshire*; and by a distinct clause, *three* of the twelve were to choose a chaplain to officiate in the church of *Sandford*, within the parish of *Kirton*, with the consent and approbation of the major part of the inhabitants

1 Kyd on Corp. 402.
 (a) 10 Mod. 75.
 12 Mod. 232.
 (b) Cowp. 249.

(c) 2 Burr. 1019.

Attorney-General v. Day,
 2 Atk. 212.

inhabitants of *Sandford*; on a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of *Sandford*; the third dissented: the question, whether this was a valid election, coming before Lord Chancellor *Hardwicke*, he is reported to have expressed himself thus:—"It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so, if all be summoned, and *part* appear, a major part of those that *appear* may do a corporate act, though nothing be mentioned in the charter of the major part. This is the common construction of charters, and I am of opinion, that the three are a corporation for the purpose for which they are appointed, and that the major part of them may do any corporate act: this was a corporate act, and the choice too was confined, and consequently, it was not necessary that all the three should join."

Where a charter requires an act to be done by the *major* part of a *definite* body, no corporate assembly can be composed of less than a majority of such definite body, when complete; and consequently, when the number is reduced *below* that majority, the power of acting is at an end. But in such case, if the number be indefinite, the words *major part* have no operation, and any number of the body, duly assembled, however small, is sufficient to form a corporate assembly.

Monday, *id.* 530. *Rex v. Bellringer*, 4 Term Rep. 810. *Rex v. Miller*, 6 Term Rep. 268.

With respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable and many incapable, and a corporation aggregate of many persons capable, that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head besides, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part, in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting voice.

Where it appeared that an officer was removable by bailiffs and burgesses, or the greater part of them, "of whom the bailiffs to be two," and it was said in the return to a mandamus, that he was removed by the bailiffs and burgesses, the bailiffs being then present, the court held, that if the actual consent of the bailiffs had been required in this case, their consent should be intended, either as actually given, or as included in that of the major part: but they held that it was not required; for that, as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs being the head of the corporation, nothing could be done without their *presence*, though it had not been expressly required, and its being so required did not render their concurrence necessary.

Where the head office of a corporation is vested in more than one person, as in the case of two bailiffs, the *presence* of both is absolutely necessary, because both fill but one office.

Where the provisions of a charter direct that the new mayor shall be sworn *before* his predecessor, the *presence* only of the latter

Rex v. Newsham,
Say. Rep.
211. *Rex v. Grimes*,
5 Burr.
2558. *Rex v. Varle*,
Cowp. 248.
Rex v.

Rex v. Blythe,
5 Mod. 404.
421. Reg.
v. Sutton,
10 Mod. 74.
Cotton *v.*
Davies,
1 Str. 53.

2 Ld. Raym.
1236.
2 Salk. 434.

1 Kyd on
Corp. 423.

Rex v. Ellis,
2 Str. 934.

is not sufficient: there must also be his *assent*; at least nothing must appear from which his *dissent* is manifest.

8. Of the Regularity of their Proceedings.

Ca. temp. Hardw. 157. Where corporate acts are to be done, not on a charter day, and by a select body, there must be a summons of every member, except such as have absolutely deserted the town.

And where there are different assemblies in a corporation with distinct powers, and all the members of the smaller assembly are members of the more numerous; if the more numerous assembly be summoned to meet to exercise the powers lodged in them, those who are members of the smaller assembly cannot separate from the rest, and exercise their distinct powers: but there must be a summons for that purpose of the smaller assembly by itself.

Rex v. Mayor of Carlisle, 1 Str. 385. Machell v. Nevinsen, 2 Ld. Raym. 1255. S. P. The corporation of the city of Carlisle consisted of a mayor, aldermen, bailiffs, and capital citizens, who together formed the common council, and had the power of electing capital citizens; the power of amotion was in the mayor and aldermen only, or the major part of them. The common council met for the purpose of transacting the business of that assembly; and the mayor and aldermen made an order for the amotion of one Poukter, a capital burghers, for a cause which was allowed to be legal. The court held, that the removal in this case was not regular, and that there ought to have been a summons for the mayor and aldermen to meet in their distinct capacity.

Per Lord Parker, in Rex v. Strangers, Hil. 1 Geo. 1. cited by Ld. Hardwicke, Ca. temp. Hardw. 151. 1 Barnard. 80. Musgrave v. Mayor of Appleby, 1 Str. 584. 2 Ld. Raym. 1350. See Kyd Corp. 434., &c.

Rex v. Mayor, &c. of Shrewsbury, Ca. temp. Hardw. 147. Where a summons is necessary, it is not sufficient that the usual and general orders be given to the summoning officer; the latter must actually do every thing he possibly can to summon all the members of the select body.

Per Eyre, J. 1 Str. 386. It has been said, that though the assembly of a select number held *not* on a charter-day, be irregular, unless every member within reach of summons, be actually summoned, yet that in the summons it is not necessary to specify any particular act. However well-founded this may be, as applied to the ordinary business of the corporation, it seems that, in the case of an amotion of a corporator, a *general* summons to every member is not sufficient; but that it is necessary to mention, that it is intended to consider the question of removing the particular person; perhaps even that will not be sufficient, but it may be necessary to state the *cause* of his intended amotion. This, however, does not appear to be fully settled, for in the cases where the amotion of members has been held irregular for want of *proper* summons, the determination

tion has generally proceeded on the circumstance of there having been no summons at all.

But no summons is necessary where a member is not resident within the town.

It is laid down as a general rule, that where there is a *usual* method of notice, that cannot be dispensed with, though there be an actual summons of all the members, unless indeed every single member be present at the meeting, and consent to waive it.

Saltash, 5 Burr. 2682.

Where it is intended to remove any one of the members or officers of a corporation, it is, in general, absolutely necessary, not only that he should be summoned generally to attend; but he must have a particular summons to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offences, which he may have had no opportunity of preparing to answer.

But there may be particular circumstances, under which the summons may be dispensed with. Thus, says Holt, C. J. "a man ought not to be disfranchised until he has been heard in his defence, on notice and preparation, and notice is only necessary for that purpose. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare by such a time, this will be good, though there be no actual summons, because if the party be heard it is sufficient."

If a party be charged with a particular offence in one assembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it seems very doubtful whether his being charged and answering in the *same* assembly will cure the want of notice.

2 Salk. 435. See 1 Kyd. Corp. 445, 6, 7, 8, 9.

Where a person is removable for non-residence, there is no necessity to summon him before he is removed, because he has abdicated the town, and is out of the reach of summons (a). But if he be removable for non-attendance at the corporate assemblies, he must have had personal notice to attend, and that his presence was necessary; for the *usual* notice of the intended meeting will not be sufficient, unless that *usual* notice be personal (b).

151. 446. Palm. 431. 1 Sid. 14. 2 Sid. 97. Fortesc. 205. (b) Rex v. Richardson, 1 Burr. 517.

A man may be constituted a burgess, or appointed to an office, by deed under the common seal, and then he ought to be discharged in the same manner: but where the party is constituted or appointed by election, nothing more is required than an entry in the books of the corporation; and he may be discharged by an order entered in the same manner.

So, where an office is granted by deed, the *resignation* or *surrender* ought also to be by deed; but where an officer is appointed by election, the corporation may accept his resignation or surrender by parol before them: "if, indeed," says Holt, "a man speak at large, and say he will be no longer alderman, &c. that signifies nothing: but if he come in an open assembly of the corporation,

5 Burr. 2601.

Rex v. Mayor, &c. and Rex v. Little, &c. Freeman of Saltash, 5 Burr. 2682.

James Bagg's case, 11 Co. 99. a. Gt. 120. case, 1 M. & C. 33. 37.

Rex v. Chalke, 1 Ld. Raym. 225. 1 Salk. 42.

Seijeant Whitaker's case, 2 Ld. Raym. 1240.

(a) Comb. 198. 270. 1 Show. 259. 364. Reg. v. Trubody, 2 Ld. Raym. 1277. cited in Dougl. 152. 157. Vid. Sty.

1 Ld. Raym. 226. 1 Kyd. Corp. 450.

1 Ld. Raym. 563. 2 Salk. 423.

corporation, and there resign his office, declaring that he will not continue in it any longer, and desire them to accept his resignation, and they accept it and elect another in his room, this is a good resignation."

With respect to the presiding officer, it is to be observed, that, where strangers are not interested, all *voluntary* acts not *necessary* to carry on the business of the corporation, done by an usurper or a mayor *de facto*, or under the authority of either, seem to be void: and that some *necessary* acts are void in both cases. For

1 Str. 1090.
Andr. 163.

1 Kyd Corp.
454.

2 Str. 1109.
Andr. 388.

though in the case of *The King v. Lisle*, the court dwelt upon the circumstance of the election of the defendant, not being a *necessary* act, yet it appears from subsequent cases, that the circumstance of the act being *necessary* is not alone sufficient to make it good.

In the *King and Hedden*, the defendant made a title to the office of bailiff of *Scarborough*, from an election under the bailiffship of *Batty and Armstrong*, and on issue joined whether these were bailiffs or not, a record of a judgment of ouster against them was read in evidence; and on a motion for a new trial, it was holden, that it was properly admitted; and the same evidence was said to have been lately admitted in a trial at bar, in a case relating to the corporation of *Orford*.

3 Burr.
2601.

In the case of the *King and Grimes*, a question having been made, whether the *special verdict* found on the information against *John Leigh*, for usurping the office of mayor, and the judgment given thereupon against him, were evidence in the present case against *Grimes* for usurping the office of capital burges; and to what degree it ought to be allowed; the court held it to be admissible, but not conclusive, and, in fact, gave judgment against him, on the ground that *Leigh*, who had presided at his election, was not a rightful mayor. In the first of these cases, if not in both, the election was an act *necessary* to the preservation of the corporation.

1 Barnard.
385.

Where the mayor's presence is necessary at a corporate assembly, his departure before a business, regularly begun, be concluded, will not invalidate that particular business, but the assembly cannot proceed to any thing else.

9. Of the Election and Amotion of their Members.

5kin. 45.
2 Kyd Corp.
5.

There cannot properly be any election to an office which is not actually vacant, for though it may be a practice in some cases to choose a person before-hand, which may be called an inceptive election, and on the death of the predecessor, to admit the person before nominated, which completes the election; yet such an inceptive election is not binding on the electors; and when the vacancy really happens, they may elect another.

2 Kyd Corp.
6.

If the election of a particular officer be, by ancient charter, vested in one body, a subsequent one cannot of itself alter the mode of election; but if the subsequent charter be accepted by the corporation at large, or if they acquiesce under it, and act in conformity

conformity to it, which is evidence of acceptance, the latter mode of election is valid.

By a charter of Henry 4, it was granted, that the mayor, aldermen, and citizens of *Norwich*, might elect two to be sheriffs of that city: *Charles* the Second, in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one sheriff, and the citizens the other.—The subsequent elections were made according to the provisions of the latter charter, and were held good by the opinion of two justices against one. Skin. 574.

The privilege of election may be in one body, and the privilege of approbation in another: thus, the privilege of election to the office of alderman in *London* and in *Norwich* is in the ward, and that of approbation in the mayor and aldermen; but if the mayor and aldermen reject, without reason, one chosen by the ward, a peremptory *mandamus* will be granted to admit him. 2 Salk. 436.

Where the person elected is unqualified, and the electors at the time have notice of the want of qualification, their votes to him are thrown away, and the person who has the next greater number to the qualified person, is to be considered as duly elected. Reg. v. Boscawen, P. 13. Ann. E. R. Rex v. Withers, P. 8. G. 2. B. R. cited in

2 Burr. 1020. Cowp. 537. Taylor v. the Mayor of Bath, M. 15 G. 2. B. R. cited in Cowp. 537.

Where a candidate is proposed in a corporate meeting duly assembled, and a majority of the persons assembled protest against any election, and do not propose any other candidate, the minority may elect the candidate proposed. Oldknow v. Wainwright, 2 Burr. 1017. See the case of

the King v. Monday, Cowp. 530., and 2 Kyd Corp. 17., &c.

Where the time and manner of election are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them. Machell v. Nevinston, 2 Ld. Raym. 1355. Newling v. Francis, 3 Term Rep. 189.

It seems now to be acknowledged, notwithstanding the opinion of Lord *Coke* (a) and others, that every corporation aggregate hath, as incident to it, a power of removing its members for reasonable cause. Tidderley's case, 1 Sid. 14. Lord Bruce's case, 2 Str. 819. Rex

v. Richardson, 1 Burr. 517. (a) James Bagge's case, 11 Co. 99. a. Yates's case, Sty. 477. Rex v. Mayor of Coventry, 1 Ld. Raym. 394. Rex v. Mayor, &c. of Doncaster, 2 Ld. Raym. 1566.

But this power, like every other incidental power, is incident to the corporation at large, and cannot be exercised by any select body, unless given it by charter, or claimed by prescription, or in consequence of a by-law made by the body at large. And it is laid down as a general principle, that where by custom a particular body has acquired that power, and a subsequent charter in some respects new models the constitution of the corporation, but retains the particular body, without restraining its customary power of disfranchisement, the power still continues in the particular body. 2 Kyd Corp. 56. Dougl. 149. Haddock's case, Sir Thomas Raym. 435.

This power, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at 2 Kyd Corp. 56. Rex v. Taylor, 3 Salk. 231.

at a regular meeting holden in a corporate character, or at least holden in the character, by virtue of which they are empowered to amove: thus, where it appeared by the return to a *mandamus* that the common council had the power of amotion, and it was alleged as a fact, that the party complaining was removed by thirty of the common councilmen, in the council chamber assembled, the court held this to be insufficient; because it did not appear "that the thirty common councilmen were *then and there* assembled as a common council, as they might be there to feast, or for other purposes not connected with their corporate character."

Fraith-
waite's case,
1 Ventr. 19.

A *mandamus* having been directed to the mayor, bailiffs, and burghesses of the town of *Northampton*, commanding them to restore one *Braithwaite* to the place of common councilman; they returned, that by letters patent of incorporation, power was given them of holding a common council, consisting of a mayor, two bailiffs, and forty-eight burghesses; that the power of removing any common councilman from his place upon just cause, was given to the mayor, bailiffs, and *such* burghesses as had been mayors; that *Braithwaite* had been a common councilman, and committed several offences, which were particularly expressed; and that the *common council* assembled together and procured *Braithwaite* to be summoned, but that he did not appear to answer; on which he was removed from his office and place in the common council, "*by the mayor and burghesses, by the authority, and according to the charter aforesaid.*"

It was objected, that this amotion was not according to the authority given by the charter; for that it was said to be by the mayor and burghesses, so that it might have been by the mayor and *all* the burghesses, many of whom might not have been mayors, whereas the charter confined the power to the mayor and *such* of the burghesses as *had* been mayors: but the objection was overruled, on the ground, that it must be intended that *all* the burghesses were present, and agreed to the amotion; and that as it was alleged to be by the mayor and burghesses *according* to the charter, the dissent of the burghesses who were qualified, was not to be presumed.

2 Myd Corp.
57. Dy.
332. in
tang.

Sir T. Jones,
52. Sir T.
Raym. 181.
1 Ventr. 77.
82.

Rex v.
Mayor, &c
of Coventry,
1 Ed. Raym.
391.

This power of amotion, when possessed as incident to the corporation at large, cannot be exercised without reasonable cause; nor can it be *so* exercised either by the corporation at large, or by a select body, whether given by charter or claimed by prescription, if it be given or claimed only in general terms: but if a charter, by express words, empower either the corporation at large, or a select body, to remove an officer at pleasure, or empower them to choose him *during* pleasure, they may in either case remove him without cause. So, a corporation by prescription may, by custom, have the power of removing an officer at pleasure: But, in the return to a *mandamus*, commanding them to restore an officer so removed, it will not be sufficient to state "that they are a corporation by prescription, and that the king, by letters patent, reciting that they had a custom to remove at pleasure, confirmed *that* with other customs;" they must allege the

the custom in positive terms, and not simply by way of recital in the letters patent.

So, if an officer, either by the provision of a charter, or by custom, be eligible in the alternative for life, or during pleasure, and he be chosen to continue during pleasure, he may, at any time, be removed without cause: and where an officer is removable at pleasure, or chosen to continue *during* pleasure, the election of another is a determination of his office, without any formal removal, or notice of the intention to remove him. So, if the mayor for the time being have power to elect a town-clerk, it follows of course, that he may remove the former town-clerk at his pleasure.

Pepis's case,
2 Show. 69.
1 Vent. 342.

Rex v.
Mayor, &c.
of Canter-
bury, 1 Str.
674.
2 Keb. 641.
1 Sid. 15.

But where an officer is removeable at pleasure, the corporation, in their return to a *mandamus*, commanding them to restore him, ought to rely solely on that circumstance; for they cannot take advantage of it, if they return a cause, and that cause be not sufficient; because it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will.

2 Ld. Raym.
1240.

A common freeman cannot be deprived of his freedom at the *pleasure* of the corporation at large, or of any select body, whether that power be claimed by charter or prescription.

Warren's
case, Cro.
Ja. 540.

The case of a common councilman is, in several books, distinguished, in this respect, from that of an alderman; it being frequently holden that a power of removal is good as to the former, and void as to the latter.

Ibid. 2 Roll.
Rep. 112.
Sir T. Raym.
188.
1 Vent. 77.
2. Rex v.

Mayor, &c. of Coventry, 1 Ld. Raym. 591. Rex v. Burgum Andover, *id.* 710.

To the power of amotion, or disfranchisement, the power of holding a corporate meeting for that purpose is necessarily incident, whether the former be in a select body, or in the corporation at large; and therefore it is not necessary that the latter should be expressly given by charter or claimed by custom.

2 Kyd Corp.
62.
Douglass. 135.

The cause for which a member of a corporation is disfranchised, or an officer removed, must be something which has arisen subsequently to the admission of the one to the enjoyment of his franchise, or of the other to the exercise of his office: the power of disfranchisement or amotion cannot be exercised for a defect of original qualification; that can only be questioned by a prosecution by information in the nature of *quo warranto*.

2 Kyd. *ut*
supr.
Douglass. 80.

The offences for which a corporator may be disfranchised, or a corporate officer removed, have been distributed into three distinct classes.

Ca. temp.
Hardw. 154.
1 Burr.
538.

First, Such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office.

Secondly, Such as have no immediate relation to his corporate or official character, but are in themselves of so *infamous* a nature, as to render the offender unfit to enjoy *any* public franchise; such as perjury, forgery, &c.

And, thirdly, offences of a *mixed* nature, being not only against his corporate or official duty, but also indictable at common law.

2 Kyd Corp. 63. To burn or deface the charters or evidences of the corporation ; or to rafe or corrupt the books, are offences against the corporate duty of a corporator, for which he may be removed ; but in the case of a rasure of the books, the party must appear to have acted maliciously, and to the detriment of the corporation, for it might happen that the entry, as it stood, was wrong, and that he only made it as it ought to be.

Sir Thomas Raym. 438. So, if he make a riot in disturbance of an election of a mayor or other officer, or endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the business of the corporation ; so, if he continue in court and make orders, after the court is adjourned.

2 Kyd Corp. 64. Circumstances which have no immediate relation to the corporation, may be a sufficient cause to remove a man from an office of magistracy, provided they be such as render him incapable or unfit to execute the office ; such as habitual drunkenness in an alderman, though if a man were drunk by accident, that would not be sufficient cause to remove him.

3 Salk. 229. So, it has been holden to be a sufficient cause to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though such a cause would certainly not be sufficient to deprive a man of his freedom.

Clegg's case, 2 Burr. 732. Bankruptcy, and not having obtained his certificate, is not alone sufficient cause for removing a man from the office of common councilman, though some *one* or *more* of the *consequences* of bankruptcy may eventually become so.

2 Roll. Rep. 11. Old age is not a sufficient cause to deprive an alderman of his office.

1 Burr. 540. Non-attendance at the courts of the corporation is not sufficient cause of removal, when the presence of the party is not *necessary*, and no particular business is obstructed by his absence, though his absence be wilful, and notwithstanding he may have due notice to attend.

2 Kyd Corp. 73. Non-residence within a borough cannot be a sufficient cause to disfranchise a freeman ; because he has his freedom for his own benefit, and his residence is of little consequence to the corporation at large.

Exeter v. Glide, 4 Mod. 36. But a *total* desertion of the borough, by an alderman with his family, is a good cause to remove him from the office, because he is thereby rendered incapable of doing his duty to the corporation : but it is not a cause to disfranchise him, because, though he cease to be an alderman, he may still continue a freeman. Nor is it every temporary absence, that will be good cause for removing an alderman ; he may have some reasonable cause of absence, as sickness, or going to the Bath for the recovery of his health, or being employed in the service of the king : he may leave a servant

vant in the house, which is a proof of his intention to return, and makes him virtually an inhabitant; and if he return before his actual motion, that may cure the defect of his absence, however long continued. It has been holden, that it was not a good cause to remove an alderman, that he had left the borough for four months *with his whole family*. The length of time which the party hath been resident, seems to be immaterial, provided the residence hath been *bonâ fide*, and, in general, wherever non-residence is assigned as a cause for the removal of an alderman, or officer of similar denomination, it must appear that residence is required by the constitution of the corporation, or that the business of the corporation has been obstructed by the non-residence of the party removed.

Wherever non-residence is a cause of motion, it does not render the office *ipso facto* void, but only voidable; and there must be an actual motion before any proceedings can be had against the party for an usurpation.

245. 5 Br. P. C. 287. Rex v. Heaven, 2 Term Rep. 772.

It is no cause of removal, that a corporator has used opprobrious or indecent language to the mayor, or other principal magistrates of the corporation, as if he call the mayor a knave, or say, that he has done that in the execution of his office, which he cannot answer; though the words be in consequence of an admonition from the mayor, for a malicious act to another burges; as where a burges being church-warden presented one of the burgeses maliciously, without cause, for being absent from the perambulation; for which being rebuked by the mayor, he said contemptuously, *I care not for Mr. Mayor, nor for any of the burgeses*: nor does it seem a good cause of motion that a man has written a libel on the mayor, or on another member of the corporation. It may, in some of these cases, be proper to commit the offender till he find sureties for his good behaviour; or some of the offences may be a foundation for an action at the suit of the party injured; but they can be no cause of disfranchisement: so, neither can it be a good cause of disfranchisement or motion, that the conduct of the party is troublesome or displeasing to the body at large.

So, a *custom* to disfranchise for contemptuous words is void, even in the city of London, whose customs are confirmed by act of parliament, for that confirmation cannot extend to unreasonable customs, which this clearly is.

302. a *dictum* of Twissden, J. to the contrary. See further on this point, Sir Thomas

Though the power of conferring degrees, and of degrading, in the universities, is in the vice-chancellor, masters, and scholars, assembled in a body; yet they cannot degrade without reasonable cause: and it was decided in the case of Dr. Bentley, that a contempt to the vice-chancellor, as a judge, was not a sufficient cause to degrade.

Rex v.
Mayor of
Leicester,
4 Burr.
2087.
Rex v. John
Sargent,
5 Term
Rep. 466.
Doug. 182.
174-

Vaughan v.
Lewis,
Carth. 227.
Rex v. Pon-
sonby, Say.
772.

2 Kyd Corp.
James
Baggs's
case, 11 Co.
96.
Clerk's case,
Cro. Ja.
506.

Per Holt,
C. J. For-
tefc. 275.

11 Co. 94.

2 Salk. 426.
2 Ld. Raym.
777.
Clark's case,
1 Vent. 327.
2 Id. 1 Vent.
Earle's case,

1 Mod. 148.
Fortesc. 202.
2 Ld. Raym.
1334.
1 Str. 557.

11 Co. 98.
b.

If a man threaten, or endeavour either by himself or in combination with others, to do a thing against the trust of his freedom, and to the prejudice of the publick good of the city or borough, but do not put it in execution; as if he threaten the ruin of their charter or privileges, or dissuade the payment of customs due; this may be a good cause to punish him as before mentioned, but not to disfranchise him.

2 Ld. Raym.
1564.
4 Burr.
1999.

Misconduct in *one* corporate office is not a cause to amove the offender from *another*; thus, if a capital burgeess be appointed chamberlain of the corporation, and misconduct himself in *that* office, this is not a good cause to deprive him of the office of capital burgeess.

1 Ld. Raym.
226.

(a) 1 Sid. 282.

(b) Com.

Dig. Fran-

chise, F. 33.

fays Semb.

contr.

Raym. 446.

(c) 2 Ld.

Raym.

1566.

2 Kyd Corp.

88.

Though an offence may seem to have some relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cause of disfranchisement: thus, the misemployment or non-payment of money, belonging to the corporation, is no sufficient cause, the corporation having a remedy by action; nor, a refusal to pay his proportion of the expence of renewing the charter (a); nor a refusal by a liveryman, to make the usual payments for support of the company (b); nor general disobedience to the laws and orders of the corporation; nor, as it would seem, the breach of any particular bye-law (c).

For offences which have no immediate relation to the corporate office, but which the loss of credit renders a ground of forfeiture, the corporation cannot disfranchise or remove, without a previous conviction at common law; for in such cases the corporation cannot try the truth or falsehood of the accusation: it is for this reason, that it is no cause to remove or disfranchise a man, that he is *indicted* of felony, perjury, forgery, libelling, or other infamous crime, because he may be acquitted of the charge.

Style, 479.

Lane's case,

2 Ld. Raym.

1304.

11 Mod. 270.

Fortesc. 275.

Ca. temp. Hardw. 155.

1 Burr. 359.

Rex v.

Yates,

Style, 477.

Rex v.

Mayor, &c.

of Derby,

Ca. temp.

Hardw. 153.

and the cases

there cited.

Rex v. Ri-

chardson,

1 Burr. 438.

Rex v. Cor-

poration of

Doncaster,

2 Burr. 738.

With respect to those offences which are of a mixed nature, as being not only against the oath and duty of the corporator, but also matters indictable at common law, it seems to be exceedingly doubtful whether for these the corporator can be removed without a previous conviction. The difficulty ariseth from the possibility of a difference of determination by two different jurisdictions, as the party may be removed by the corporation for the same fact, of which he may afterwards be acquitted on a trial by jury. The question hath been often discussed, but hath never received a final decision.

Sawyer's

are. 220

Warrant,

22. cited

1 Burr. 525.

(d) 1 Burr. 550.

It hath been asserted, that, after conviction, the king might, by writ issuing out of the court where the conviction remains, or out of Chancery, command the corporation to discharge the party convicted; but this doctrine has been justly disregarded (d).

Rex v.

Amey,

2 Term

Rep. 516.

In some instances, too, the crown has reserved to itself the power of removing at pleasure all or any of the principal officers of the

the corporation; but whatever may be said as to the invalidity of such a reservation, as being repugnant to the purpose of the charter, such a power cannot certainly be exercised to such an extent as to destroy the whole body at once, and render the election of other officers impossible.

(F) How they are visited.

Spiritual corporations are visited in ecclesiastical matters (*a*) by the ordinary: eleemosynary corporations are subject to the visitation of the founder, his heirs, or assigns; and other civil corporations to that of the king in his court of King's Bench. In respect of schools endowed, where no special visitor (*b*) is appointed by the founder, and (perhaps it may be added) where his heirs are unknown or do not choose to act, it is provided by the statute of charitable uses that they may be visited by commissioners appointed under the great seal.

canon or prebendary for incontinency or other offences described in the statutes; and this, of his own authority without observing all the preliminary forms the statutes may appoint. *The King v. Bishop of Chester*, 1 Will. 206. 1 Bl. Rep. 22. But a bishop, as visitor of the dean and chapter, seems to have no jurisdiction to determine between the members on the subject of their corporate property. *Rex v. Episc. Dunelm.* 1 Burr. 567. It is clear, that he cannot by virtue of such power fill up a vacancy in the stalls of the cathedral by lapse. *Bishop of Chichester v. Harwood*, 1 Term Rep. 650. And whether he can, as visitor, decide in matters of election to such stalls, is a question which hath not yet received a general solution. *Id. ibid.* (*b*) 1 Wooddef. 474, 5.

1 Bl. Com. 480.

(*a*) And the ordinary may in his general visitation, by virtue of his general visitatorial power, deprive a

It is only over eleemosynary foundations that the visitatorial power, properly so called, extends. For this power, as now understood, is final and conclusive, exercisable voluntarily, in a summary mode, and without appeal. And as the court of King's Bench cannot interfere till called upon, and its judgments are liable to be reversed by writs of error, it seems to want two of the essential marks of visitation.

1 Wooddef. 474.

1 Bl. Com. 481.

This kind of power appears to be of very early date, mention being made of it in the beginning of the reign of *Edward* the 3d. It was not introduced by any canons or ecclesiastical constitutions, but is an appointment of the law, and arises from the property which the founder had in the lands appropriated for the support of the charity. Hence, it is in the power of the founder to vest it in any person and his heirs, or in a sole corporation and his successors; but if he appoint no one to exercise it, it will descend to his own heirs.

grant is to him in his political capacity, and it is not necessary to mention his successors. *Bentley v. Bishop of Ely*, 2 Str. 913. Fitzg. 308.

8 E. 3. Cg, 70. 8 Aff. pl. 29. 31. 1 Vez. 472. 2 Term Rep. 352. If it be given to the Bishop of E., not by his christian name, the

Rex v. Master, &c. of Catherine Hall, 4 Term Rep. 233.

If the founder dies without making any appointment of a visitor, and without heirs, it will in that case devolve upon the king to be exercised by the great seal.

Where the persons, for whose benefit a charity is established, are not themselves incorporated, but trustees or governors are appointed, as in the case of *Sutton's hospital*, the governors have a kind of visitatorial power with respect to the objects of the charity; but

2 Kyd, 187. 10 Co. 31. a. *Eccles v. Foster*, 2 P. Wms. 323.

Attorney-General v. Lock, 3 Atk. 164. Attorney-General v. Middleton, 2 Vez. 327.

but where no visitor is expressly appointed, and the legal estate of the endowment is vested in the governors, the latter, as to the management of the revenues, are subject to the jurisdiction of the court of Chancery.

2 Kyd, 195. 6. Fitzg. 108. 307. 3 Atk. 663. 1 Vez. 78. 2 Vez. 328. 1 Burr. 200.

As the power of appointing a visitor is entirely in the founder, he may delegate it either generally or specially; if he appoint a general visitor, without any restraint, the person so appointed hath all incidental powers. But a person constituted visitor in general terms, may be restrained in particular instances. So, the founder may appoint a *special* visitor for a *particular* purpose, and no farther. So, he may make a *general* visitor, and yet appoint an inferior *particular* power, to be executed by another person, who will then be a *special* visitor. Thus, the visitation of the corporation at large may be in one person; and that of one of the members, as of the head, may be in another: and if the founder of a college appoint a visitor of the head specially, the general power of visitation remains in the founder and his heirs. The manner too in which the visitatorial power shall be exercised, whether general or special, may be preferred by the founder.

*Id. ubi
supr.*

No technical or set form of words is necessary for the appointment of a visitor. "*Visitator sit Episcopus Eliensis*," is an appointment of a general and perpetual visitor. But a person may be a general or special visitor without any express appointment, by construction and implication from various branches of the statutes.

Appleford's case, 1 Mod. 82. Carth. 92. 1 Lev.

The sentence of a visitor, on subjects within his jurisdiction, is final and conclusive, and the king's courts cannot in any form of proceeding, review it.

23. 65. Raym. 56. 94. 100. 1 Sid. 94. 152. 346. Phillips v. Bury, Skin. 447. 2 Term Rep. 346. Rex v. Episc. Eliens. 5 Term Rep. 475.

3 Atk. 674.

Nor will the king's courts anticipate the judgment of a visitor, or take away his jurisdiction, if the case in which they are called upon to interfere appears to be within the scope of the general visitatorial power.

Rex v. Allop, 2 Show. 170. Skin. 13.

In a return to a mandamus directed to a college, it is sufficient to state in general terms, that such a person is visitor; for as visitor, he has power to determine all matters that come as grievances before him, unless he be particularly restrained by the statutes, and such restraint will not be presumed. Nor is it material whether the grievance complained of happened in the time of the present visitor, or in that of his predecessor, and therefore it is not necessary to shew that in the return.

Rex v. Whitley, 2 Str. 1139.

The question, whether there be a visitor or not, may be sometimes decided on affidavits: but if a mandamus has been granted, commanding the party to whom it is directed to admit a person to a fellowship, on an affidavit of his election, the court will not supersede the writ on affidavits that there is a visitor, but will put the defendant to make a return; because where the point is determined on affidavits against the party complaining, he has no opportunity to do himself justice by an action.

Ingraved

Ingrafted fellowships in colleges, where the founders of them make no statutes for their regulation, are subject to the general laws of the college, and, consequently, to the visitor's jurisdiction.

Green v. Rutherford, id. 475. St. John's College v. Toddington, 1 Burr. 159.

As independent members of colleges are mere boarders, and have no corporate rights, it follows, that they are not subject to the visitor's jurisdiction, and cannot obtain redress for any grievance by appealing to him. Neither indeed can they in matters of discipline obtain redress in a court of law.

It seems rather doubtful whether a person who is not yet actually a member of an eleemosynary corporation, but who claims a right to become one, be a proper subject of visitatorial jurisdiction.

If it be questioned whether any visitatorial power exists in the person applied to in that character, this must be settled by the court of King's Bench.

So, if a visitor should assume the power of making new statutes, such usurpation would be restrained by the court of King's Bench.

1 Vez. 472.

If the performance of a trust is to be decreed, a court of equity must be resorted to, for a visitor is incompetent to do complete justice. So, if a college agree with a stranger to grant him a lease, and refuse to perform the agreement, the remedy is by bill in equity for a specific performance, and not by appeal to the visitor.

If the statutes of a college give to the same person who is visitor the power of appointing to an office one out of two persons returned to him by the college, he has that appointment not as visitor, but by virtue of such express provision, and therefore must make choice of one of the persons returned to him: if he assume the appointment of any other person, the court of King's Bench will interpose.

And the same common law judicature will interpose, if the visitor be a party. Thus, where a mandamus was directed to the Bishop of *Chester*, as warden of *Manchester* college, requiring him to admit a chaplain, and he made return, that he was visitor of the society; it was holden, that though a mandamus will not lie where there is a visitor free from objection, yet here the two offices being in the same person, there is a temporary suspension and the King's Bench must exert its authority.

power over *Manchester*-college, whenever the wardenship should be holden in *commendam* with the bishoprick of *Chester*. *St. 2 Geo. 2. c. 29. See too, 4 Term Rep. 244.*

In the case of *Dr. Bentley*, master of *Trinity-college* in *Cambridge*, who was cited before the bishop of *Ely*, as visitor over the society, to answer sixty-four articles charged to be violations of the statutes; the King's Bench granted a prohibition, because the bishop in his citation had not set forth his genuine authority. But the House of Lords, on a writ of error, reversed the former judgment, and went into the consideration of the several articles, and, as to some, confirmed the prohibition, and, as to others, allowed the bishop

Attorney-General v. Talbot, 1 Vez. 78. 1 Burr. 159.

Ex parte Davison, cited in Cowp. 319. Rex v. Grundon, Cowp. 315. Rex et Reg. v. St. John's College, 4 Mod. 260. Comb. 253. 1 Burr. 153.

Green v. Rutherford, 1 Vez. 472. 1 Burr. 201.

1 Vez. 473. Rex v. Windham, Cowp. 373.

Rex v. Episc. Eliens, 2 Term Rep. 290.

Rex v. Episc. Cestr. 2 Str. 797. In the year after this determination, an act was passed, to vest in the crown the visitatorial

Bentley v. Bishop of Ely, 2 Str. 912. Fitzg. 127. 305. 4 Br. P. C. 1 Woodd. 481.

(a) Yet it seems as yet unsettled who is general visitor of that seminary. 1 Woodf. 481. to proceed. It was indeed insisted, that the king was general visitor (a) and the bishop special visitor only; but the King's Bench was of a different opinion; and, in this respect, their judgement seems unimpeached.

Rex et Reg. v. St. John's College, 4 Mod. 233. Where the publick laws of the land are disobeyed, the court of King's Bench will interfere, notwithstanding there be a visitor, for his province is confined to the private statutes and domestick regulations.

Rex v. Episc. Lincoln. 2 Term Rep. 338. n. Rex v. Episc. Eliens. 5 Term Rep. 475. If a visitor refuse to receive and hear an appeal, the court of King's Bench will grant a mandamus to compel him.

Brideoak's case, H. 11 Ann. cited in 1 Will. 209. 1 Bl. Rep. 25. 58. But where the visitor has actually executed a sentence of expulsion, though he may appear to have exceeded his jurisdiction, a mandamus will not lie to restore the party expelled, for that would be to command the visitor to reverse his own sentence.

(b) Per Lee, C. J. 1 Will. 209. (c) 1 Vez. 470. The party, however, against whom the sentence has been executed, may have a remedy by ejectment (b); or he may, it is said, have an action for damages against the visitor (c).

2 Kyd. 282. Dr. Walker's case, Ca. temp. Hardw. 212. Rex v. Episc. Eliens. Andr. 176. When the visitor has pronounced a sentence, which by the statutes of the college a particular officer is to put in execution, the court of King's Bench will not compel that particular officer by mandamus, to do his duty; because that would be to interfere with the privilege of the visitor, who has power to compel the proper person to execute the sentence: but it seems doubtful, whether, if the visitor himself refuse to compel the execution of the sentence, the court will grant a mandamus directed to him for that purpose.]

(G) Of the Dissolution of Corporations.

(d) Roll. Abr. 514. (e) 10 Co. 30. b. Roll. Abr. 514. S. P. —If any corporation aggregate, as mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after seems not good. Co. Lit. 52. b. 2 Roll. Abr. 12. 14 H. 8. 3. 11 H. 7. 19. (f) The master of a college cannot devise lands to the house of which he is head. Dalif. 31. 4 Leon. 223.

(d) IF all the members of an aggregate corporation die, the body politick is dissolved; but if the king makes a corporation consisting of twelve men, to continue always in succession, and when any of them die, the others may choose another in his place; (e) if three or four of them die, (f) yet all acts done by the rest shall be sufficient.

1 Roll. Abr. 514. Co. Lit. 264. Reg. v. [But where a corporation consists of several distinct integral parts, if one of these parts become extinct, whether by the death of the persons of whom it is composed, or by any other means, the whole

whole corporation is dissolved. This indeed was doubted in the case of *Colchester v. Seaber* (a); but a later adjudication (b) hath settled, "that when an integral part of a corporation is gone, and the corporation hath no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the crown may grant a new charter to a different set of men."

which occurred in 1766, it appeared, that in 1730 there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the corporation: that those persons were all dead before the year 1763: that from 1740 to 1763 no person took upon himself to be, or claimed to be, mayor or alderman; and that in 1763 the charter under which they acted when the case occurred, was granted and accepted. The question immediately before the court was, whether the present corporation could maintain an action on a bond given to the old corporation in the year 1735? which was determined in the affirmative; for that the charter of 1763 restored the corporation to all its former rights and franchises, and subjected it to all its former obligations. (b) *Rex v. Paimore*, 3 Term Rep. 199.

Also, a corporation may be dissolved by misuser or abuser; for as all franchises flow from the bounty of the crown, so there is a tacit or implied condition annexed to such grants, which, if broken, forfeits the whole franchise.

case of the *quo warranto* against the city of London, which was brought against the whole corporation, 1. For that the common council had petitioned the king, upon a prorogation of parliament, that it might meet on the day on which it was prorogued, and had charged the prorogation as that which occasioned a delay of justice. 2. That the corporation had imposed new taxes on their wharfs and markets, which was an invasion of the liberty of the subject, and contrary to law; and the judgment in that case was, that the franchise should be seized into the king's hands; but *vide* 2 W. & M. § 1. c. 8., by which this judgment is declared to be void and illegal; and *vide* the case of Sir James Smith, Show. 280., 4 Mod. 52., 12 Mod. 17, 18., 10 Mod. 174., who being chosen an alderman of the city of London, after the same judgment (which was never recorded) the question was, whether he was duly elected, so as to be obliged to take the oaths prescribed by 1 W. & M. c. 3? and it was resolved, that though a corporation may be forfeited, yet that the proceedings and judgment in the *quo warranto* against the city, did not dissolve the body politic, or make their subsequent acts void; and consequently, that Sir James not taking the oaths pursuant to the 1 W. & M. c. 3., was a sufficient cause to remove him from the place of alderman. See Skipp. 310. Show. Rep. 280.

If the members of a corporation refuse or neglect to choose such officers, as they are obliged to choose by their charter, this is a forfeiture, and consequently a dissolution of the corporation (c).

[(c) In such case the corporation is dissolved without any legal proceeding: but for a forfeiture it is not dissolved without a judgment in a court of law to enforce it. "A *jeire facias* is proper," says Mr. Justice Ashurst, "where there is a legal existing body capable of acting, but who have been guilty of an abuse of the power entrusted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard: but that does not apply to the case of a non-existing body. A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but who, from some defect in their constitution, cannot legally exercise the powers they affect to use."—If, in a prosecution against a corporation, the judgment be for the defendants, the form of it is, "that the liberties be allowed," Co. Entr. 535. b.; if it be for the crown, and the parties have continued possession of the franchise by wrong from the beginning, the judgment is, "that they be ousted;" but if they once had title, and lose it, the judgment is, "that the liberty be seized into the king's hands." Yelv. 192. Co. Entr. t. *quo warranto*. The prior judgment of seizure is called a judgment "*quousque*;" this judgment, it hath been thought, would dissolve the corporation, if the parties did not come in and avoid it the same, or at the farthest, the next term, and that there was no use in a final judgment, but to shew that the king will take advantage of the forfeiture, which he may declare by the grant of a new charter. *Rex v. Amery*, 2 Term Rep. 515. But this opinion was over-ruled in the House of Lords, where it was determined, that the effect of this judgment was merely to lay the king's hands on the franchise of being a corporation, so that the corporation could not use its liberties, and the action of its vital powers was suspended; that in that situation the king might appoint a custos; and might introduce a new corporation by charter, to whom he might commit the custody; but that the old corporation were entitled to redeem their liberties, and remove the king's hands, upon which the power of the new corporation must necessarily cease, and the letters-patent to them become void. *Vide* the judgment in *Rex v. Amery* in the House of Lords, in the account of that case in two volumes quarto, and 2 Kyd, 496., &c.—With respect to the form of a final judgment, it was determined in Sir James Smith's case, that the corporation of London was not dissolved by the judgment as recited in the act of 2 W. & M. st. 1.

Ballivos de
Dewdley,
1 P. Wms.
207.
10 Mod. 346.
(a) 3 Burr.
1866. In
this case,

2 Inst. 222.
20 E. 4. 5.
But for this
vide the ar-
guments in
the great

Carth. 483.
but *vide*
11 Geo. 1.
c. 4.

c. S.,

c. 8., which was, "that the liberty, franchise, and privilege of the city of London, being a body politick, &c. should be seized." For the word *of* being omitted before the word *being*, the judgment was not against the corporate existence of the city, but against the franchises it enjoyed: and Holt said, "that a corporation might subsist after its franchises were taken away; for that these were not essential to it, but only a privilege appertaining to it; that the essence of a corporation was to make bye-laws, and govern their members, which a corporation might do, though their franchises were seized." 4 Mod. 52. Skin. 310. Carth. 217. 1 Show. 263.]

Salk. 191. 12 Mod. 247. A corporation may be dissolved by surrendering the charter, but a surrender of an old charter is void, for want of enrolment.

Co. Lit. 102. b. If a prior and convent, *concurrentibus iis que in jure requiruntur*, are translated to an abbot and convent, or to a dean and chapter, though the name is changed, yet the body is not dissolved.

3 Co. 75. b. Though a dean and chapter have surrendered (*e*) all their possessions to the king, yet their corporation continues, and they remain a chapter of the bishop to assist him in spiritual matters, &c. for all their possessions were from the bishop, and a prebendary, though he hath no possession, hath *stallum in choro* & *vocem in capitulo*.
(a) But there cannot be a guardian of a chapel, when the chapel and all the possessions thereof are aliened. 3 Co. 75. a. 10 Co. 32., for there cannot be a guardian of nothing.

Co. Lit. 13. b. If lands are given to a corporation, which is (*b*) afterwards dissolved, the donor shall have the lands again; for the law annexes such a condition in every grant to a body politick.

Godb. 211. [Mo. 283. acc. Vide tamen 20. Jac. C. B. Johnson v. Morris, that the lands shall escheat. Hall. MSS., which also cites 21 E. 4. 1., and 21 H. 7. 9. And the case of Johnson v. Norway in Winch. 37., which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch, that the judges finally decided the point. See also *contr.* Lord Coke, the case of Southwell v. Wade, in 1 Ro. Abr. 816. A. p. 1., and S. C. in Poph. 91.—Co. Lit. 13th ed. 13. b. n. 2.] Roll. Abr. 816. (*b*) A debt due to a corporation still remains, though their name is changed by a new charter. 3 Lev. 238.—If a corporation bind themselves in a bond, and are afterwards dissolved, they shall not be charged in their natural capacities. Lev. 237., and vide Owen, 73. 2 And. 107.

Costs.

(A) Of the first Introduction of, and giving the Plaintiff Costs *de incremento*.

(B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,

1. Of Actions of Trespasses, where the Right of Freehold or Inheritance may come in Question, as also of wilful and malicious Trepasses.

2. Of

2. Of Actions of Slander.
3. Of Actions of Assault and Battery.

(C) Where the Costs shall be doubled or trebled.

(D) Of awarding the Defendant his Costs.

(E) What Persons are entitled to or exempted from paying Costs: And herein,

1. Of Executors and Administrators.
2. Of Officers and Ministers of Justice.
3. Of Informers, and where the Prosecution may be said to be carried on at the Suit of the King.
4. Of Paupers.

(F) Of Costs in Replevin.

(G) Of Costs in a Writ of Error.

[(H) Of Costs in a feigned Issue.]

(I) Of Costs in the several Steps and Proceedings of a Cause.

(K) Costs how assessed or taxed.

(A) Of the first Introduction of, and giving the Plaintiff Costs *de incremento*.

THERE were no costs at common law (a); but if the plaintiff did not prevail he was amerced *pro falso clamore*; if he did prevail, then the defendant was *in misericordia*, for his unjust detention of the plaintiff's right, and therefore was not punished with the *expensa litis*, under that title.

2 Inst. 288.
[(a) Altho' costs were never given at common law, *ex nomine*, yet

in reality they were always included in the quantum of damages, in those actions where damages were given; and even now, costs for the plaintiff are always entered on the roll as increase of damages by the court; the form of which entry may possibly have arisen from the abovementioned practice. 3 Bl. Comm. 399. And it is said by Lord Chief Baron Gilbert, that the justices in eyre were wont at their *iters*, before the statute of Gloucester, to assess the costs of the plaintiff, where he prevailed, at a reasonable sum, exclusive of, and unblended with the damages which he recovered; and that this custom prevailed till the introduction of the modern justices of assize and *nisi prius*; at which time it became necessary, that the costs should be taxed by the court above, and not by the judges on their circuits. Gilb. Hist. C. P. 266.]

But it being thought exceeding hard that the plaintiff, for the costs which he was out of pocket in obtaining his right, could not have any amends;

(a) This extends to all legal costs of suit, but not his expenses of travel, loss of time, &c. 2 Inst. 288. — In a writ by journeys accounts,

By the statute of *Gloucester*, made 6 E. 1. cap. 1. by which in an assise, &c. damages, upon the insufficiency of the disseisor, are given against him that is found tenant, and damages are given in a writ of *mort d'ancestor*, *aiel*, &c., reciting that whereas before that time, damages were not taxed but to the value of the issues of the land, it is provided the demandant may recover against the tenant the (a) costs (b) of his writ, together with his damage; and that this act shall hold place (c) in all cases where the party is to recover damages.

the plaintiff shall recover his costs of the first writ, and the proceedings thereupon. 2 Inst. 288. *Secus*, if the first writ was naught through the plaintiff's default, 2 Inst. 288. as if brought against one joint-tenant only. Kelw. 127. (b) If judgment arrested, the plaintiff, in a new action, shall not recover the costs of the first. Cro. Car. 545. (c) Where a man before, or by this act, did not recover damages, though single, double, or treble, are given by a subsequent act, the plaintiff shall recover no costs. 10 Co. 116. a. As, in a *quare impedit*. 2 Inst. 289. 10 Co. 116. a. Kelw. 26. a. *Decies tantum*. 10 Co. 116. b. So, in an action upon 5 E. 6. c. 14. of ingrossers, 10 Co. 116. b. — But in all cases where damages were recovered before, or by this act, the plaintiff shall recover his costs also. 10 Co. 116. b. [This distinction, with respect to the plaintiff's right to costs, between cases where damages are originally given by a statute subsequent to this act, and those where damages might have been recovered at common law, is impugned by Lord Coke himself, who saith, "This clause doth extend to give costs, where damages are given, to any demandant or plaintiff, in any action by any statute made after this parliament." 2 Inst. 289. And though it was recognised by three justices against Willes, C. J. in the case of Witham v. Hill, 2 Will. 91. Barnes, 151. and by Aiton, J. in the case of Wilkinson v. Allott, Cowp. 367. yet it seemeth not to be law at present, "for the statute of Gloucester is a remedial act, and, consequently, ought to have a favourable interpretation." Per Lord Loughborough, 1 H. Bl. 13. Costs, therefore, have been allowed in actions against the hundred upon the statute of 9 Geo. 1. c. 22. for setting fire to the plaintiff's house. Jackson v. Inhabitants of Calfworth, 1 Term Rep. 71. See too Greetham v. the Hundred of Theale, 3 Burr. 1723. Bull. N. P. 331. And it hath been repeatedly decided, that in an action of debt upon any statute, by the party grieved, for a certain penalty, the plaintiff shall have his costs, although the act on which the action is founded give no costs. 1 Roll. Abr. 516. pl. 5. 574. pl. 1. Cro. Car. 559. 1 Saik. 206. 1 Ld. Raym. 172. 2 Term Rep. 154. Ward v. Snell, 1 H. Bl. 10.]

This was the original of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attornies that attended the cause.

10 Co. 116. (d) That in a *formidori*, no damages were recovered, and

And this was done in (d) all real actions in which there were damages at common law, and also in all personal actions; for even in an action of debt, there are damages given for the unjust detention.

consequently no costs. Cro. Car. 425. Vent. 88. Lev. 146. Raym. 134. [The statute of Gloucester doth not extend to give damages upon the traverse of an inquisition, although damages may be found thereon for the prosecutor: for to recover costs under this statute, there must be a plaintiff or defendant, demandant or tenant. Ca. temp. Hardw. 355. 2 Str. 1069.] For costs on penal statutes, *vide infra*, letter (E) and title *Damages*, in what actions damages were recovered.

(B) In what Cases the Plaintiff shall have no more Costs than Damages : And herein,

1. Of Actions of Trespafs where the Right of Freehold or Inheritance may come in Question, or where the Trespafs is wilful and malicious.

BY the 43 *Eliz. cap. 6.* it is enacted, "That if upon actions personal to be brought in any of her majesty's courts at *Westminster*, not being for any title nor interest of lands, nor concerning the freehold nor inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debts or damages to be recovered there in the same court, shall not amount to the sum of 40*s.* or above, that in every such case the judge and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The intent of this statute was to reduce all actions where the debt or damages were under 40*s.* into the court-baron, or other county courts, whereby it was thought the profits of landlords would be increased, and the costs of defendants diminished; but the statute failed of effecting that purpose; for it does not put it merely upon the damages given by the jury under forty shillings, (for it would be hard when the jury gave too little damages, to have punished the plaintiff with the loss of his costs,) but leaves it to the judge to certify the damages proved were not above 40*s.* in approbation of the verdict; but the judges thought it extremely hard to certify, in order to make plaintiffs lose their costs where they had prevailed, unless the action were exceedingly impertinent and vexatious; and therefore seldom made use of this power (a).

[In an action for taking and carrying away sand and gravel upon *Hounslow Heath* the plaintiff recovered a verdict with damages under 40*s.*, and Lord Chief Justice *Willes* who tried the cause, having certified, under this statute, that the damages found by the jury, were the real damages to be recovered, the court held it to be a case within the act, and refused to allow any more costs than damages.

So, in an action of trespass for assaulting the plaintiff, stopping his waggon, and taking away his cart-rope, the defendant justified the taking of the rope as a distress for toll, due to the corporation of *Doncaster* under whom he was collector, and likewise stated a demand and refusal previous to the making of the distress; the replication traversed any demand of the toll before the taking of the distress, and issue being joined thereon, the plaintiff obtained a verdict, at the trial, with one shilling and sixpence damages. The

D 2

judge

Gilb. Hist. C. P. 265.

[(a) No instance of a certificate upon this statute is to be met with in the books, earlier than about the middle of the reign of George the Second.

Gilb. Eq. Rep. 196.

3 Will. 325.]

White v.

Smith,

C. B. P.

17 G. 2.

cited in

2 Str. 1232.

and 1 Will.

94.

Walker v.

Robinson,

1 Will. 94.

2 Str. 1232.

judge who tried the cause, certified under the statute. The plaintiff obtained a rule to shew cause why he should not have full costs, upon the grounds, that an *assortavit* was laid in the declaration, and there was special pleading, either of which circumstances, it was alleged, had been always holden sufficient to carry full costs; but after argument, the rule was discharged.

Howard v.
Cheshire,
Say. Rep.
250.

In an action of trespass, a case was reserved for the opinion of the court, stating, that the action was brought for taking a distress; that the defendant justified as agent to General *Choldmendley*, by virtue of a reservation in a lease of land from the general to the plaintiff; and that issue having been joined upon a traverse of the agency of the defendant, a verdict was found for the plaintiff with one penny damages, and that the judge, who tried the cause, had certified pursuant to the statute 43 *El. c. 6. Dennison and Foster*, the only judges in court, held, that the issue being collateral to the plaintiff's interest in the land demised, the plaintiff could have no more costs than damages.

Bartlett v.
Robbins,
2 Wils. 258.

Where a plea of tender was found against the defendant, yet, as the plaintiff did not recover damages to the amount of forty shillings, it was holden that there might be a certificate under the statute.

Dand v.
Sexton,
3 Term
Rep. 37.

A notion formerly prevailed, that the statute empowered the judges to certify only in those actions which are within the jurisdiction of the county, and other inferior courts: but it hath been holden in a late determination, that the words of the statute comprehend *all* personal actions (not being for any title to lands, or for any battery); even actions *vi et armis*, which cannot be brought in the county court.

Holland v.
Gore, Say.
Costs, 18.

A certificate upon this statute, may be granted after the trial of the cause.]

(a) The statute 11 & 12 W. 3. c. 9 enacts, that this statute shall extend to the principalities of *Wales*, and counties palatine.

* This statute does not extend to the *Marches*, or other inferior courts, that may hold plea in such actions; nor does it extend to any case where the defendant justifies, or pleads specially.

“ By the 22 & 23 *Car. 2. cap. 9.* for preventing trivial suits, contrary to the intention of 43 *Eliz.* commenced in the (a) courts at *Westminster*, it is enacted, for the making the said law effectual, that in all actions of trespass, assault, and battery, and other personal actions, wherein the judge at the trial shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, if the jury find damages under 40s. the plaintiff shall not recover more costs than the damage, and if more costs given, the judgment shall be void, &c., and the defendant may have his action for such vexatious suit*.”

Gibb. Hist.
C. P. 263.
Gibb. Fq.
Rep. 157,
108.
2 Vent 36.
S. C. 180.
195, 215.
3 Mod. 59.

This statute seems to have pursued the same purpose with that of the 43 *Eliz.* (b) but neither of them repealed the statute of *Gloucester*, (for a statute cannot be repealed by implication,) nor did the statute of *Car. 2.* take away costs *de incremento*, except where the judge's certificate was necessary; and that was only where the trespass was done to the freehold, or to things fixed to the freehold,

and the damages under 40s.; and in battery, where the damages were under such sum; for the wording of the statute is, that there should be no costs in battery, trespass, or other personal actions, unless the judge certify the battery to be proved, or the title of the freehold to have come in question; hence these words in the act, *other personal actions*, were construed to extend no farther than to cases where the judge was permitted to certify, which was only in battery, and actions of trespass relating to the freehold, and things fixed to the freehold.

former, by certificate deprives the plaintiff of full costs; the latter, by certificate entitles him to full costs. 1 Will. 95.]

Therefore in trover, or action of trespass *de bonis asportatis* of goods and chattels not fixed to the freehold, the plaintiff shall have his full costs, though the damages be found to be under 40s. and though the judge do not certify pursuant to the statute.

So, if an action of trespass to the (a) freehold, and an action of trespass *de bonis asportatis*, are joined, and the plaintiff recovers in general upon both counts, he hath no need of a certificate to obtain his costs; and therefore costs *de incremento* shall go upon the statute of Gloucester.

an inferior tradesman, the plaintiff shall recover full costs. See stat. 4 and 5 W. and M. Salk. 212. pl. 2. 1 Ld. Raym. 149. Com. Rep. 26. 12 Mod. 121. Comb. 420. 5 Mod. 307.

[*A fortiori* then, if in an action of trespass *quare domum fregit et bona asportavit*, the defendant be acquitted as to breaking the house, and found guilty only of taking away the goods, the plaintiff shall have full costs, of whatever amount the damages may be; for the acquittal as to the trespass upon the freehold, reduces it to a question of mere personal property, which is not within the statute of 22 & 23 Car. 2.]

So, in trespass for breaking his close, and impounding his cattle, the plaintiff shall have his full costs; (b) for the impounding of his cattle is an injury to his personal property, in which no right of freehold can come in question.

chasing his cow, and his domestick fowls, viz. hares, geese, &c., with dogs which were used to bite tame fowls, by whose biting they were killed; on not guilty, verdict for the plaintiff; and he had his full costs, because this is not a trespass wherein the right of freehold may come in question. Mich. 9 Geo. 1. in C. B. Keen and Whistler, Stra. 534. — So, in trespass for breaking his close, and chasing his bull, verdict for the plaintiff, and one penny damages; and held by the court that he should have his full costs, because the 22 & 23 Car. 2. c. 9. extends only to such actions of trespass where the freehold may come in question. Pasch. 9 Geo. 1. in C. B. Thomson and Berry, Stra. 551. Gilb. Rep. 197.

So, in trespass for chasing his sheep, and that he the defendant *ad loca ignota eos abduxit & elongavit*, after verdict for the plaintiff, and 2d. damages, he had his full costs, principally upon the word (c) *abduxit*, which is the same in signification with *asportavit*.

any thing be carried off from the grounds, though of never so little value, it will be an *asportavit*; for the words *abcarriavit* and *asportavit* in declarations mean such a carrying as amounts to the defendant's use. Gilb. Rep. 198. And vide 2 Vent. 215. where digging roots, and removing them about two yards in the same ground, amounted to an *asportavit*. [But from later resolutions, it should seem, that the asportation should be an absolute and entire removal of the property from the land of the owner, and not a partial conveyance of it to another part of the premises. Franklin v. Jolland, B. R. H. S. W. 3. cited in 1 Str. 634. Anon. 1 Str. 633. Gilb. Eq. Rep. 178. However, if what is laid in the declaration as an *asportavit* amount to nothing more than a description of the mode in which the injury to the land

2 Mod. 141.
2 Lev. 234.
1 Salk. 203.
[(b) There is this difference between the Statutes of 43 Eliz. and 22 and 23 Car. 2., that the

Salk. 208.
Pl. 7.

Com. Rep. 19. pl. 12.
(a) Though to the freehold only, yet if for hunting by c. 23. § 10. Carth. 382.

Anon. 1 Freem. 394.

3 Mod. 39.
Barnes and Edgar, adjudged.
(b) So, in trespass for

Carth. 225
Salk. 208.
pl. 7., like case.

(c) And note that if

was effected, and is laid as part of the same act, a certificate, although the plaintiff obtains a general verdict, is requisite to entitle him to full costs, unless the damages should be found to the amount of forty shillings. Clegg v. Molyneux, Dougl. 780.]

Raym. 847. So, in trespass *quare vi & armis* the defendant flung down certain
Smith and stalls of the plaintiff's, in a market-place; on not-guilty, and
Barterton, verdict for the plaintiff, but damages under 40s. the court held,
adjudged. that the plaintiff, without the judge's certificate, should have full
2 Jones, costs; for this is a trespass done to a chattel, in which no title of
232., and freehold can come in question; and though they had been fixed to
2 Show. 258. the freehold, yet if the defendant had carried them away, it would
S. C. ad- be out of the statute.
judged.

Carth. 224. But where the trespass is merely to the freehold; as where in
trespass the plaintiff declared that the defendant *herbam depascendo*,
& *solum & fundum carucis subvertendo*, & *in solo fodiendo*, & *cum*
terra inde project. aque cursum suum obflupand., *per quod clausum*
suum inundat. fuit, &c. the plaintiff shall have no more costs than
damages.

Ventr. 48. So, trespass *quare clausum fregit*, and put stakes in the plaintiff's
ground, was holden within the statute.

Trin. 11 G. So, in trespass *quare clausum fregit*, & *quendam taurum personæ*
1. in C. B. *ignotæ fugavit*, *per quod* the plaintiff's gooseberry bushes, *necnon*
adjudged. *quinque perticas* (angl. poles) *in eodem claus. erect.*, *affix.*, & *existent.*
Anon. *fregit, laceravit*, & *spoliavit*, after verdict and one penny damages,
Stra. 633. the court held, that the taking and pulling up the poles was not
Gibb. Rep. such an asportation as amounted to conversion; and that though
198. the trespass begun by chasing the bull, yet the damage is laid to be
done to the freehold; and so the title thereof might well come in
question.

Mich. So, in trespass for breaking and entering the plaintiff's house,
12 Geo. 1. and keeping him out of possession and use of the said house, with
in C. B. a *continuando* for a month, *per quod* he was put to great expence to
Blunt and gain the possession of his house, and in the mean time lost the profit
Miller, ad- and use thereof; after verdict for the plaintiff, and 2 s. 6d. damages,
judged. the court held, that this was a plain trespass *quare clausum fregit*
Gibb. Rep. within the statute, and that the *per quod* was only matter of ag-
197. gravation.
Stra. 645.

2 Vent. 180. Also, if there be a trespass upon the freehold, and likewise a
195. [Bunb. count laid *de bonis asportat.*, in order to put in for costs merely, if
203. Gibb. there be no evidence of the carrying away of the goods, by which
Eq. Rep. the defendant is acquitted as to that, though he is found guilty as
199.] * In to the trespass to the freehold, yet if the damages be under 40s.
trying such the plaintiff shall recover no more costs than damages*.
cases, it is
very ne- necessary attention, on the part of the defendant, should be given to the declaration, and to the evidence,
cessary attention, on the part of the defendant, should be given to the declaration, and to the evidence,
and if an *asportavit* is not found, to see that the verdict be properly taken. Though if a verdict be
taken generally, and no evidence given of an *asportavit*, and damages under 40s., the court, on motion,
will amend the verdict, by the judges notes.

(a) 2 Mod. It is further to be observed in the construction of the statute
141, 142. 22 & 23 Car. 2. that there is no need of a judge's certificate,
2 Freem. where by the pleading it appears that the title or interest of the
214. pl. 222. land is in question; (a) as in an action for eating his grass, *per*
(b) Where *quod* his common was impaired; so, (b) if the defendant justifies by
the defend- any
ant justifies

any thing that brings the title of the land in question, the judge need not certify, to entitle the plaintiff to his costs.

extra viam, and found for the plaintiff, he shall have full costs. After *v. Finch*, 2 Lev. 234. Higgins v. Jennings, 2 Ld. Raym. 1444. 2 Stra. 726. Beale v. Moor, 2 Str. 1168. [But it is otherwise, if the way under which the defendant justifies, be defined by metes and bounds in the plea, and the plaintiff reply *extra viam*; for here no doubt can arise concerning the extent and locality of the way, since these circumstances are admitted and agreed by the pleadings; and therefore a certificate from the judge, that the freehold or title was in question, is necessary to entitle the plaintiff to full costs, in case the jury find damages under forty shillings. Cockerill v. Altamson, B. R. Tr. 22 Geo. 3. Hullock, 86. Bull. Ni. Pr. 330.]

[But if in trespass *quare clausum fregit*, the defendant plead a justification, and thereupon the plaintiff make a new assignment to which there is a plea of not guilty; in such case, if the plaintiff do not recover damages to the amount of 40s., and there be no certificate, there shall be no more costs than damages; for a new assignment is equivalent to a new declaration; and where the defendant pleads only not guilty to it, there is in reality no special pleading in the case.

So, if in such action, the defendant plead two pleas, not-guilty and a justification, and a verdict be found for the plaintiff on the former, with damages under 40s., and a verdict for the defendant on the latter, there cannot be full costs without a certificate, because the issue joined on the special plea, being found for the defendant, the case is exactly the same as if only the general issue had been pleaded.]

If an action be commenced in an inferior court, and removed by *habeas corpus* or *certiorari* into the courts of *Westminster*, the plaintiff shall have full costs, although the damages are under 40 s. of *Canterbury v. Fuller*. 1 Ld. Raym. 395. but in *Gavel v. Scudamore*, 2 Lev. 124. this is doubted, where the cause is removed by the defendant.]

Also, by the 8 & 9 W. 3. cap. 11. for preventing wilful and malicious trespasses, it is enacted, "That in all actions of trespass, to be commenced and prosecuted from and after the 25th of March 1697, in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause at *Westminster* it shall appear, and be certified by the judge, under his hand, on the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding."

[Although this statute speaks generally of "all actions of trespass," and Lord C. J. *Willes* was of opinion that every wilful trespass was within it, yet there is no instance of a certificate upon it, except in actions of trespass *quare clausum fregit*.

Every trespass is wilful within the meaning of this act, where the defendant has notice, and is forewarned not to come upon the land; as every trespass is malicious, where the intent of the defendant plainly appears to be to harass and distress the plaintiff.

And it was holden by *Eyre, J.* at *Essex* Lent Assizes, 1719, that where a trespass was wilful, a judge would certify, though no malice proved; which was said to be the practice.

for a way, and issue is joined upon

Ibbotson v. Brown, Barnes, 124. 129. Lloyd v. Day, id. 149.

2 Ventr. 180. 195.

[*Roop v. Scritch, 4 Mod. 379. Archbishop*

Milburne v. Read, 3 Will. 325.

3 Bl. Com. 214. 1 Term Rep. 636.

6 Vin. Abr. tit. Costs, 332.

Ford v.
Parr,
2 Will. 21.

A certificate under this act must be made by the judge in open court; if made out of court, it is void.]

2. Of Costs in Actions of Slander.

[This statute is a direct repeal of that of Gloucester quoad actions of slander;

By the 21 *Jac.* 1. *cap.* 16. it is enacted, "That in case for slanderous words to be sued or prosecuted in the courts at *Westminster*, or other courts that have power to hold plea thereof, after the end of that session of parliament, if the damage is found to be under 40s. the plaintiff shall recover (a) no more costs than damages."

for in these if the damages do not amount to 40s., costs *de incrementis* are taken away by express and positive words. *Ci b. Eq. Rep.* 196.] (a) By this the power of the judges is taken away, as to giving costs *de incrementis*, where the damage is under 40s. but it is said to have been the resolution of the judges, that though the court cannot increase the costs, yet the jury are not bound by the statute, and therefore they may give 10*l.* costs where they give but 10*d.* damages. *Salk.* 207.

Cro. Car.
141. Law
and Hor-
wood, ad-
judged,
Ley, 82.

In the construction of this statute, it has been holden, that it extends not to actions for slander of title, for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person.

Topfall v.
Edwards,
Cro. Car.

So, if for calling thief, and causing him to be arrested, &c., and the defendant is found guilty of both, it is not within the act.

163. [Blizard v. Barnes, *Id.* 307. S. P. Carter v. Fish, 1 Str. 645. S. P.]

Salk. 206.

pl. 5.
Browne and
Gibbons
adjudged,
2 Ld. Raym.
831. S. C.
7 Mod. 129.
S. C. Andr.
375. S. P.
Burry v.

So, where the plaintiff brought an action on the case for slanderous words spoken of his wife, *viz. that she was a whore*, per quod *she lost such and such customers*; after verdict for the plaintiff, and damages under 40s. the court held, that the plaintiff should have full costs, for it is not the words, but the special damage which is the cause of action in this case; and it was incumbent on the plaintiff to prove the special damage, otherwise the action would not have lain for the words.

Perry, 2 Stra. 936. 2 Barnard, K. B. 79. 84. 113. 2 Kel. 71. pl. 30. S. P.

Turner v.
Horton,
Barnes, 132.
Surman v.
Shelleto,
3 Burr.
1688.
Collier v.
Gaillard,
2 Bl. Rep.
1062.

[It is indeed now settled, beyond controversy, that where the words are actionable in themselves, without the special damage, the plaintiff can have no more costs than damages, where the latter are under 40s. But where the words are not actionable in themselves, but the action is maintainable only with respect to the special damage, then it is a case at large, and without the statute; and, if any damages are recovered, the plaintiff will be entitled to full costs.

Littlewood
v. Smith,
1 Ld. Raym.
181. But
if in an ac-
tion for
slander com-
menced ori-

It hath been holden, that this statute of 21 *Jac.* 1. *c.* 16. notwithstanding the comprehensive words which the legislature hath used in it, doth not extend to courts baron, and other inferior courts; for as damages cannot be given in those courts to the amount of 40s. it would be impossible to tax costs *de incrementis* in any action of slander beyond that sum.

ginally in an inferior court, and afterwards removed into one of the courts at Westminster, the plaintiff recover under 40s., he shall have no more costs than damages. *Anon.* C. B. T. 12 Ann. 2 Com. Dig. 546. *Vide* Latch 2. 58.

A plea of justification will not take the case out of this statute. 2 Will. 258.
per Clive, J.
Dover v. Robinson, Barnes, 128.

If upon a writ of inquiry, the damages be assessed under 40s. Lampen
and the costs be taxed above that sum, and judgment be entered v. Hatch,
up accordingly, the judgment will be reversed in toto. 2 Str. 934.

In an action of *scandalum magnatum*, no costs are recoverable, 2 Show.
however large the damages may be.] 506.

3. Of Costs in Actions of Assault and Battery.

By the 22 & 23 Car. 2. cap. 9. it is enacted, "That in actions
" of assault and battery, wherein the judge at the trial shall not
" find and certify, under his hand, upon the back of the record,
" that an assault and battery was sufficiently proved, if the jury
" find damages under 40s. the plaintiff shall not recover more
" costs than damage."

On this part of the statute it has been (a) holden, that if an (a) 1 Vent.
assault be only proved, the plaintiff shall have no more costs than 256.
damage. 2 Lev. 102.

That if a man brings trespass for beating his servant, *per quod* Salk. 206.
servitium amisit, it is not an action of assault and battery within the Pl. 5.
statute, but is an action founded upon the special damage, in 5 Mod. 74.
which there shall be full costs. 7 Mod. 129.
2 Ld. Raym. 831.

[Neither is an action for criminal conversation with the plain- Batchelor
tiff's wife within this statute, for the criminal conversation is the v. Bigg,
gift of the action, and not the assault.] 3 Will. 319.
2 Bl. Rep. 854.

In trespass of assault and battery, wounding and imprisonment, Mich. 10
as also for entering and breaking his house, and opening the doors Geo. 1. in
of the said house, and breaking three locks and three bars belong- C. B.
ing to the said doors, the defendant pleaded not guilty to all ex- Beck and
cept the imprisonment, and for that he justifies; and on the Nicholls,
trial the justification was found for the defendant, and the not Stra. 577.
guilty for the plaintiff, and the damages 2s. 6d. and held by the Gilb. Eq.
court, that the damages being under 40s. he could not have full Rep. 197.
costs for the battery, because the judge had not certified the battery * But if
to be well proved; neither could he have full costs for breaking defendant
the house, because this is a trespass relating to the freehold*. had not
justified the
imprison-
ment, and
he had been
to full costs.

found guilty of that, plaintiff would have been entitled

[Again, in an action of trespass, the plaintiff declared for an Clarke v.
assault and battery upon himself, and also for striking his horse, by Obery,
which he was lessened in value; the defendant pleaded not guilty, 1 Str. 624.
and there was a general verdict for the plaintiff with 20s. damages,
but no certificate from the judge. The plaintiff moved for full
costs on account of the special matter stated relative to the horse,
which, on consideration, were refused by the court.

But where the declaration charged the defendant with an assault, Milburne v.
battery, and wounding, and with obstructing the plaintiff in getting Real, cited
his coals, taking them away, treading and trampling upon them, break- in 3 Will.
ing 322.

ing and spoiling the standard and roller of the plaintiff, and taking away his goods and chattels, and a general verdict was found for the plaintiff upon the whole charge, except the taking away of the goods and chattels; it was holden, that he was entitled to full costs, notwithstanding the damages were under 40s., and the judge had not certified an assault and battery to have been proved: for there was a spoliation in this case distinctly stated, upon which the plaintiff might have brought his separate action, and have recovered full costs without a certificate.

Hampson v. Adhead, Say. Rep. 91. Bull. Ni. Pri. 329. Cotterill v. Tolly, 1 Term Rep. 655.

It hath been resolved, that there shall be no more costs than damages, (should the latter be under 40s.,) without a certificate, in an action for assault and battery, and for tearing or injuring the plaintiff's clothes, if the tearing or other injury be charged in the declaration, or found by the jury to have been in consequence of the beating.

Carruthers v. Lamb, Barnes, 120. Cotterill v. Tolly, 1 Term Rep. 655. (a) Mears v. Greenaway, 1 H. Bl. 291. Atkinson v. Jackson, id. 295. Lockwood v. Stannard, 5 Term Rep. 482.

But it seems to have been once thought, that where in such an action the tearing or damaging of the clothes is laid in the declaration as a distinct and substantive fact, and not as a consequence of the beating, even though such charge should be contained in the same count with the injury to the plaintiff's person, a certificate is not necessary to entitle the plaintiff to full costs. However, it is now settled (a) that if the tearing of the clothes appear to have been at the same time with the injury to the person, the court will consider it as part of the same transaction, and allow the plaintiff no more costs than damages, notwithstanding the declaration may not allege the former injury as consequential to the latter.

Richards v. Turner, Bull. Ni. Pri. 330.

Where the defendant pleads a justification to the assault and battery, as *son assault demesne*, there is no need of a certificate to entitle the plaintiff to full costs, for the justification is an admission of the battery, and is tantamount to a certificate of its having been proved. But if the defendant justify, and the plaintiff make a new assignment, to which the general issue is pleaded, he will have no more costs than damages without a certificate. Neither will he, if the defendant justify the assault only.]

Page v. Creed, 3 Term Rep. 391.

(C) Where the Costs shall be doubled or trebled.

10 Co. 116. a. 2 Inst. 289. Hard. 152. Carth. 297.

IT seems agreed that where damages were before recoverable and a statute increases them to double or treble the value, the plaintiff shall recover his double or treble damages; and costs also, as parcel of the damages, shall be trebled.

[1 Ld. Raym. 20. Gilb. Hist. C. P. 267. Cowp. 365.]

Vide ubi

supr.

(b) As upon the statute 2 E. 6. c. 13., for not setting

But where a new statute gives either single, double, or treble damages, where there were no damages recoverable before, (b) there no costs shall be allowed, because the party can have nothing more than such new statute has already given, and that is damages only; for the statute of Gloucester cannot operate to add costs to what

what is given by a subsequent statute, because the new statute must be construed from itself, which gives damages only.

Jac. 70. Cro. Car. 560. Hard. 152. but now *vide* the 8 and 9 W. 3. c. 11.

(a) In an (b) action for a forcible entry upon 8 H. 6. cap. 9. which gives treble damages, the plaintiff shall recover not only treble damages but (c) treble costs also.

S. P. adjudged. (b) So, in an assise upon the statute for a disseisin with force. 10 Co. 116. b. (c) And the costs *de incremento*, as well as those given by the jury, shall be trebled. Cro. Eliz. 582. Leon. 282. 2 Leon. 52. Co. Lit. 257. 2 Stra. 1044.

But in an action of debt upon the statute of 1 & 2 Ph. & M. cap. 12. of distresses, upon the branch of the statute by which the 5 l. and triple damages are given to the party grieved, for driving a distress out of the hundred, no costs are to be given, because the statute, by intendment, gives triple damages in lieu of the whole.

So, in an action of waste against tenant for life or years, by the statute of Gloucester, cap. 6., the place wasted, and treble damages shall be recovered, (d) but no costs, because no action lay against them at the common law; but the action and damages are merely given.

But in waste against tenant in dower, &c. treble damages and costs also shall be recovered, because (e) an action of waste lay against them at the common law; and for the waste, damages should have been recovered.

were recoverable, but only for waste, after the prohibition delivered. 10 Co. 116. a.

In an action upon the statute of 2 H. 4. cap. 1. for suing before the admiral for a thing done upon the land, in which case the statute gives to the plaintiff double damages, without speaking of any costs, he shall recover as well double costs as double damages.

So, on the statute 2 W. & M. cap. 5. by which treble damages and costs are given against the rescouer of a distress for rent, in an action upon the case for a rescous upon the statute, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, and an action upon the case lay for a rescous at common law.

[The 28th sect. of 25 Geo. 3. c. 50., respecting duties upon game-certificates, directs, "that if any person shall at any time be sued, molested, or prosecuted, for any thing by him done or executed in pursuance of that act, or of any clause, matter, or thing therein contained, such person may plead the general issue, &c. and if the plaintiff be nonsuited, or the defendant obtain a verdict, such defendant shall be awarded his treble costs." This clause, it hath been determined, only extends to give treble costs to those persons, who are sued for something done in the execution of the act, not to those who are sued for penalties under it: and therefore, a person prosecuted under the act for shooting without

(a) 2 Inst. 289. 10 Co. 116.

1 Vent. 22.

b. (c) And

Leon. 282.

2 Inst. 289.

Kelw. 209.

N. Bendl.

80. S. C.

Roll. Abr.

516.

2 Inst. 289.

Kelw. 26. a.

Godb. 210.

S. P. ad-

judged.

W. 3. c. 11.

2 Inst. 289.

(e) A pro-

hibition of

waste only,

in which

no damages

10 Co. 116. a.

Roll. Abr.

517.

Dyer, 159.

10 Co. 116.

[Sands v.

2 Str. 1048.]

Lawson v.

Storie,

Salk. 205.

pl. 2. Skin.

555. pl. 4.

Carth. 521.

1 Ld. Raym.

19.

Smith v.

Wallis,

1 Term

Rep. 252.

without a certificate, is not entitled to treble costs upon obtaining a verdict.

Rex v.
Poland,
1 Str. 49.

Where treble costs are to be recovered against a prosecutor for matter not appearing upon the *posse*, the court will, upon motion, allow a suggestion of the special matter to be made on the record.

Sands v.
Child,
3 Lev. 355.
Lawson v.
Story, Carth. 321.

Where a person is entitled to double or treble costs, not only those assessed by the jury, but also those adjudged *de incremento* by the court, shall be doubled or trebled.

Smith v.
Dunce,
2 Str. 1048.
2 Tidd's Pr.
674, 5.

But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives double costs, they are calculated thus: 1. The common costs, and then half the common costs. 2. If treble costs, 1. the common costs; 2. half of these; and then half of the latter.]

(D) Of awarding the Defendant his Costs.

(a) Extends not to an action for an escape; for though within the equity of *Westm.* 2., that gives it against the warden of the Fleet, yet it is not properly an action upon the statute, because no mention is

BY the 23 *H. 8. cap. 15.* it is enacted, "That in any suit in a court of record, or elsewhere, in any action, bill, or plaint of trespass, upon 5 *Rich. 2.* debt or covenant, upon any specialty or contract, detinue, account, charging as bailiff or receiver, case, or (a) upon any statute for any offence or wrong (b) personal, immediately done to the plaintiff, if the (c) plaintiff (d) after appearance of the defendant be (e) non-suited, or (f) any (g) verdict (b) pass by lawful trial against the plaintiff, the defendant (i) shall have judgment to recover his costs, to be taxed by the judge of the court, and the defendant shall have such process and execution for the same, as the plaintiff should have had, in case the judgment had been for him."

made of the statute in the declaration; and this was no personal wrong. 2 Leon. 9, 10. 4 Leon. 182. but *qu.*—Nor to an action upon 8 *H. 6. c. 9.* for a forcible entry, for that was no personal wrong; and the writ says *quod d'sseisavit*. 2 Leon. 9, 10. 4 Leon. 182.—So, it extends not to an action upon 1 and 2 *P. and M. c. 12.* for unlawfully impounding a distress. 2 Leon. 52. 3 Leon. 92. And the rather, because this action is grounded upon a subsequent statute.—Nor to an action upon 5 *Eliz. c. 9.* for perjury. Hut. 22. Brownl. 66. Cro. Eliz. 177.—So, it extends not to an action upon 2 *E. 6. c. 13.* for not setting forth tithes, because a mere non-feasance, and no personal wrong. 2 Inst. 651. Noy 32. (b) It extends not to an assize. Brownl. 28, 29. (c) Otherwise, if he is an infant, for commencing his suit by guardian, there can be no malice supposed in him. Cro. Eliz. 33. & vide Bullst. 189.—Nor to persons who sue in *auter droit*; for which vide *infra*, concerning executors and administrators. (d) For this vide 2 Lev. 81, 82. (e) *Secus*, if the original be discontinued. Leon. 105. Hut. 36. Cro. Car. 575.—The plaintiff the day before the trial came into court, and entered a *nolle prosequi*, and whether the defendant should have costs, Hard. 152. *dubitatur*. (f) Though special. Cro. Eliz. 465. Hard. 152. (g) In covenant against two for not building, judgment is given against one by default, and the other pleads performance, and it is found for him, the plaintiff can have no judgment, but the defendant shall have his costs. Lev. 63. (h) Not upon demurrer that goes to the writ only; *secus*, if to the action. And. 117. vide Hard. 152. Cro. Car. 533. March 30. and 8 & 9 *W. c. 10.* by which it is now certainly given. (i) Though judgment is not given upon the nonsuit, but upon the insufficiency of the pleading. Moor 625. pl. 857. Winch 69. 3 Bullst. 248. Godb. 220. & vide Dyer 32. Cro. Jac. 159.

[By

[By the 24 H. 8. c. 8. plaintiffs, suing to the use of the king in any action whatsoever, are exempted from the payment of costs, where they are nonsuited, or a verdict passeth against them.]

Also, by the statute of 4 Jac. 1. cap. 3. it is enacted, "That if any (a) person, after the end of that session of parliament, should commence or sue in any court, any action, bill, or plaint of trespass, ejectment, or other action, (b) wherein the plaintiff or demandant (c) might have costs, and after appearance of the defendant becomes nonsuit, or any verdict passes by lawful trial against him, the defendant shall have judgment to recover his costs, to be assessed and levied as costs, by 23 H. 8."

(a) That it extends not to executors, *vide infra*.
(b) Not in an attaint, where the first verdict is affirmed, because if the jurors had been

attainted, the plaintiff should have had such costs only as in the first action, if found for him, but not more in respect of the attaint. Day and Bellamy, Cr. Car. 542. March 24. Jones 432. adjudged. [Nor shall the defendant have costs where there is a plea in abatement, which the plaintiff admits to be true, and enters a *nil capiat per breve*. Greenhill v. Shepherd, 12 Mod. 145. Allen v. Maxey, Barnes 120. Pocklington v. Peck, 1 Str. 638. But *quæ* where there is a motion to quash the writ before plea pleaded? Huer v. Whitebread, Cal. Pr. C. P. 74. Pr. Reg. 78. Poole v. Broadfield, Barnes 431. If issue be taken on a plea in abatement, and the plaintiff be afterwards nonsuited, the defendant is entitled to costs; for in the issue had been found for the plaintiff, it would have been peremptory, and he would have had costs. *Asp. in v. Constable*, 1 Cal. Pr. C. P. 35.] (c) Though the declaration is insufficient, yet the defendant shall have costs. 2 Roll. Rep. 113. Palm. 127. & *vide* Godb. 329. 345. Hob. 219. Hut. 16. Paim. 365. 3 Lev. 322. Style 153. — Though the *ripi prius* roll varied from the plea-roll, so as the nonsuit was immaterial. Raym. 38. [If the defendant remove proceedings from a county-court by *recordari facias sequendum* into one of the superior courts, and a non-judgment of *non-pros* for the non-appearance of the plaintiff, he shall have costs. Davies v. James, 1 Term Rep. 371. It was moved on the statute for setting off mutual debts, that no costs should be allowed the defendant, because he had not obtained a verdict, there being only an indorsement that 13 s. was due to the plaintiff for rent, and that on balancing the account, there appeared due to the defendant 13 s.; but the court declared, that the indorsement was equally a verdict to entitle the defendant to his costs, as a verdict in other cases. Geale v. Chapman, Cal. Pr. C. P. 65. It seems, that the defendant should be allowed all such costs upon a nonsuit, as have been incurred in taking the necessary measures for his defence in the action. Rex v. Midiam, 3 Burr. 1720. Davila v. Harding, 1 Str. 300.]

By the 8 & 9 W. 3. cap. 11. "In trespass, assault, false imprisonment, or ejectment against several, if any one or more are acquitted by verdict, every person so acquitted shall recover his costs, as if a verdict had been given against the plaintiff, unless the judge shall immediately after trial, in open court, certify upon record, that there was a reasonable cause for making such person defendant."

[This act does not extend to *trespass upon the case* for a tort. Dikken v. Cooke, 2 Str. 1005. trover, Poole v.

Poolton, Barnes 119. replevin. Ingle v. Wordsworth, 3 Burr. 1284. 1 Bl. Rep. 355. or an information. Reg v. Danvers, 1 Salk. 194. for torts are joint and several, so that one defendant may be acquitted, and the other found guilty. *Sed*, as to actions upon contracts, for contracts are joint, and one of two defendants cannot have a verdict without a demonstration that there was no cause of a joint action against both; therefore, where one of two defendants in an action of *assumpsit* had suffered judgment by default, and the other obtained a verdict, the latter, it was holden, was entitled to costs. Shrub v. Barrett, 2 H. Bl. 28. — Where the costs payable to one defendant shall be deducted out of those payable by the others, see Schoole v. Noble, 1 H. Bl. 23. Mordecai v. Nutting, Barnes, 145.]

And by the same act, "In all actions of waste, debt upon the statute for not setting forth of tithes, where the single value or damages found by the jury exceeds not twenty nobles; and in a *scire facias*, and suits upon prohibitions, the plaintiff shall recover his costs; and if the plaintiff be nonsuit or discontinue, or a verdict pass against him, the defendant shall recover his costs."

(E) What Persons are entitled to, or exempted from paying Costs: And herein,

1. Of Executors and Administrators.

Inde tit. Executors, 446. (a) **A**N executor defendant pays costs in all cases, and the judgment is *de bonis testatoris si, &c. & si non tunc de bonis propriis*: also, (b) when he is defendant, and there is judgment for him, he shall have his costs.

13. Bro. Exec. 164. Plowd. 183. [Yet it is said to have been determined in a late case, by the court of Common Pleas, that no costs shall be allowed on a judgment of assets *in futurum*, on a plea of *plene administravit*. Imp. Pr. C. P. 2 Ed. 374. Imp. Pr. K. B. 3 Ed. 275. Marg. If a bankrupt executor plead a false plea in an action commenced against him, between the issuing of the commission, and the obtaining of his certificate, by a creditor of his testator, he is liable to be taken in execution for the costs. Howard v. Jeinmet, 3 Burr. 1368. 1 Bl. Rep. 400. Where an executor pleads *non assumpsit*, and a specialty debt sufficient to cover the assets, the court will permit him to withdraw the former plea, upon payment of the costs occasioned by that plea only. Deane v. Grimp, 2 Bl. Rep. 1275.] (b) Cro. Eliz. 503. Hut. 69. 79.

N. Bendl. 19. pl. 28. Cro. Eliz. 69. 503. Winch. 10. 70. Savil, 133. Cro. Jac. 361. Roll. Rep. 63. Cro. Car. 289. Kelw. 207. Hut. 69. 79. Cro. Jac. 229. Yelv. 168. Brownl. 107. 6 Mod. 93. But an executor or administrator is not within the 23 H. 8. cap. 15. or 4 Jac. 1. cap. 3. which give costs to the defendant after a verdict or nonsuit; nor within the 8 & 9 W. & M. cap. 11. which give costs upon a demurrer, being made upon the same platform; so that when they are plaintiffs they pay no costs, for they sue *in auter droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conversant in the personal contracts of those they represent; and this by an equitable construction of the statutes, for there are no express words to exempt them.

11 Mod. 135. But (c) if executors or administrators bring an action in their own right, as for a (d) conversion or trespass in their own time, they shall pay costs. pl. 17. 174. pl. 18. See Salk. 314. pl. 21. (c) 2 H. 7. 15. Sav. 134. Hut. 79. Although they name themselves executors, for it is but surplage. Dalf. 46. Latch. 220. 1 Vent. 92.—But *vide* Mason and Jackson, 3 Lev. 60. adjudged *cont. per totam curiam*; because in the right of the testator, though a thing done in their own time.—So, in a ravishment of ward brought by executors, for a ravishment in their time. Peacock and Steer. Cro. Car. 29. By three judges *cont.* Yelv. But Hut. 78. S. C. by two judges against two; and in 6 Mod. 94. S. C. cited *per* Holt, and the reason of the resolution was, because the ward never came to the defendant's possession. (d) Where the trover is in the life-time of the testator, and the conversion in the time of the executor, he shall not pay costs. 6 Mod. 92.

Salk. 207. So, in an *indebitatus assumpsit* by husband and wife, who declared, that the defendant was indebted to them in 20*l.* as executors of the last will and testament of J. S. for money had and received to their use as executors, which he promised to pay, &c. on the trial the plaintiffs were nonsuited; and it was held, that the plaintiffs should pay costs, for the cause of action arose in their time; for the receipt being since the death of the testator, if it was by the consent of the executor it is the receipt of the executor; or if without his consent, yet the bringing of the action is a consent, and the naming themselves executors is only to deduce their right, and set it forth *ab origine*.

But

But if an executor brings an *indebitatus* upon an account made in his time, it is in the right of his executorship, and he (a) shall pay no costs.

Rep. 280. (a) If he brings an *infirmul compu'asset*, and is nonsuited, he shall pay no costs; because there was no new cause of action, but a new action upon ascertaining an antient right, notwithstanding which, it still remains the testator's debt. *Eaves v. Mocato*, 6 Mod. 93. Said to have been adjudged, 2 Ann. Salk. 207. pl. 6. 314. pl. 21. [This case of *Eaves v. Mocato* is denied to be law in Andr. 359. and 5 Term Rep. 234. In the case of *Goldthwayte v. Petrie*, reported in this last book, the action was by husband and wife, as executrix for money had and received after the testator's death to the use of the wife, as executrix, and there being a verdict for the defendant, the court held him entitled to costs.]

So, if the goods of the testator be taken and converted before they come to the hands of the executor, he shall not pay costs upon a nonsuit in an action brought for these, for they were never assets.

So, where an action was brought by an administratrix for money lent by the intestate, the defendant pleaded payment to the plaintiff after the death of the intestate, and issue joined upon it, and verdict for the defendant; it was insisted upon, that the defendant should have costs upon 4 Jac. 1. c. 3. this being a falsity in her own conscience; but it was denied, the action being as administratrix; so that upon bringing the action, that which is pleaded to be in her own conscience does not appear.

If an administrator brings an action on the case in *C. B.* and there is a verdict and judgment against him, and thereupon he brings a writ of error in *B. R.* where the judgment is affirmed; yet he shall not pay costs, for he is not a person within the intent of the statute which gives costs in this case, although it was objected, that it was his own act, and lay in his own knowledge, and was brought in *dilation executionis*.

[The question, in what cases a person suing as executor or administrator, shall be exempt from costs, is embarrassed with a variety of decisions so contradictory, that it is impossible to reconcile them: its solution, however, seems now to turn upon this distinction, namely, whether it be necessary, or not, for him to sue in his representative character: if it be necessary, he shall not be liable to the payment of costs: if it be not necessary, he stands precisely in the situation of any other plaintiff, without any claim to exemption from the character he has assumed.]

Although an executor proceed to trial, after the payment of money into court, and recover a verdict for a less sum, yet he is not liable to pay any costs.

It was formerly holden, that money could not be paid into court in an action by an executor or administrator, because the executor or administrator is not liable to costs. But it is now settled (b) that money may be paid into court in such case, for the effect of it is not to make the executor pay, but only *lose* his subsequent costs.

field v. Scott. 2 Str. 796.

Where the plaintiff is executor or administrator, he is not liable to costs under 5 Geo. 2. c. 30. § 7. though the defendant plead the general plea of bankruptcy, and obtain a verdict.

Neither does he pay costs under the 14 Geo. 2. c. 17. upon a judgment against him, as in the case of a nonsuit, for not proceeding

2 Lev. 165.
2 Jones, 47
adjudged,
4 Term

Salk. 203.
per Holt,
C. J.

Pasch.
27 Car. 2.
in B. R.
Anne
Taylor v.
Barebone.

Carth. 281.
Gale and
Till.
4 Mod. 244.
and 3 Lev.
375. S. C.

Cockerill
and Wife
Executrix v.
Kynaston,
4 Term Rep.
277. Gold-
thwayte and
Wife Exe-
cutrix v.
Petrie,
5 Term
Rep. 234.

Knight v.
Duchess
Hamilton,
Bunb. 44.

Gregg's
case, 2 Salk.
596. Bryan
v. Hollo-
way,
Barnes, 279.
(b) Crutch-

Martin v.
Norfolk,
1 H. El.
523.

Howard v.
Radborn,
Barnes, 130.

Per Cur. acc. ceeding to trial according to the course of the court in which the cause is instituted.

4 Burr. 1928. But an executor or administrator shall pay costs for not proceeding to trial pursuant to his notice, if it be through his own default.
7 Mod. 98.
118. 1 Salk. 314. 2 Ld. Raym. 806.
1 Str. 33. 3 Burr. 1305. 1585. *Ogle v. Moffat*, Barnes 133.

Nunez v. Modigliani, 1 H. El. 217. So, he hath been made to pay costs for withdrawing his record before trial.

Hullock on Costs, 193. It does not appear to be established, whether or not an executor or administrator is liable to pay costs upon discontinuing his suit; but though no general rule can be extracted from the cases upon this subject, which are contradictory, yet upon principle and the reasoning of the court in the cases referred to in the margin, it seems, that where the necessity of discontinuing is occasioned by the laches or default of the executor himself, the condition of paying costs will, generally, be annexed to the rule to discontinue.

2 Barnard. 154. *Haydon v. Norton*, Cal. Pr. C. P. 79. *Harris v. Jones*, 3 Burr. 1451. 1 Bl. Rep. 451. Bull. Ni. Pri. 332. *Bennet v. Coker*, 4 Burr. 1927. Say. on costs, 96. *Hugh v. Lloyd*, Burt. Pr. Excheq. 156.

Lumley v. Nicholls, Cal. Pr. C. P. 14. An executor shall pay costs upon being nonprossed for want of a replication, or for not declaring in due time, because guilty of a default.]
Hawes v. Saunders, 3 Burr. 1584.

2. Of Officers and Ministers of Justice.

[By 43 *El. c. 2. § 19.* (entitled *an act for the relief of the poor*,) if in any action of trespass or other suit to be brought against any person for making any distress or sale, or doing any other thing under the authority of that act, there shall be a verdict for the defendant, or a nonsuit of the plaintiff after appearance, the defendant shall recover treble damages with his costs also, and that to be assessed by the same jury, or writ to inquire of the damages, as the same shall require.]
This act extends to other actions against overseers besides trespasses.
Okely v. Salter, Yelv. 176. But the costs shall not be trebled, only the damages. *Noy*, 137. S. C. If the jury who try the issue assess only single damages, or if they omit to assess any damages at all, the court will, on a verdict for the defendant, or nonsuit for the plaintiff, supply the omission by awarding a writ of inquiry of damages. As a ground, however, for this, a suggestion must be entered on the *petita* that the defendant was an overseer of the poor, &c., and that the injury complained of was an act done in the execution of his office. Such a suggestion indeed is not necessary, where the defendant's title to treble damages appears on the record; as, where in replevin, he avows as overseer of the poor, &c. *Carth.* 362. 1 Salk. 205. 5 Mod. 76. 118. *Skin.* 595. 1 Ld. Raym. 59. 2 Str. 1021. *Ca. temp. Hardw.* 138. Say. Rep. 214. 2 Bl. Rep. 921. 3 Wils. 442.]

[See further with respect to justices of the peace and constables, 24 G. 2. c. 44., and with respect to officers of the excise or customs,

By the statute 7 *Jac. 1. cap. 5.* it is enacted, "That if any action upon the case, trespass, battery, or false imprisonment, shall be brought in the courts of *Westminster*, or elsewhere, against any justice of peace, mayor, bailiff of city or town corporate, headborough, portreeve, mayor, bailiff, (a) constable, tithing-men, collectors of fifteenths and subsidies, concerning any thing by them done by virtue of their office, they, and all others, doing any thing in their assistance, or by their com-
" mand

" mand concerning their office, may plead the general issue, &c. 20 Geo. 3.
 " and (b) if the verdict shall pass with the defendant in any c. 70. § 34.
 " (c) such action, or the plaintiff become nonsuit, or suffer a dis- and 24 G. 3.
 " continuance, the justices, or (d) such judge before whom the Sess. 2.
 " matter shall be tried, shall allow the (e) defendant his double c. 47.
 " costs." § 35.]

confable. 3 Bult. 77. Roll. Rep. 274. Moor 845. (b) Though judgment is after, given upon the insufficiency of the declaration. Helyer's case, Cro. Car. 175. [Willst v. Tidey, Carth. 188. 1 Show 214. 12 Mod. 6. S. C.] (c) But this extends not to an action upon the case against a constable, for presenting that the plaintiff was an inhabitant of A., by reason of which he was compelled to pay, &c. unjustly, because no trespass or false imprisonment, wherein liberty is given to plead not guilty. Cro. Car. 467. Nor to an action by a freeman against a Mayor, for refusing his vote in the election of a mayor, because a non-feasance. 2 Lev. 251. And said *per curiam*, that the intent of the statute was to give double costs in false imprisonment, &c. where it enabled to plead the general issue. (d) They cannot be allowed, unless the judge of assize marks the *facta*. 2 Vent. 45. 2 Lev. 251. Winch 16. [Grindley v. Holloway, Dougl. 307. They may upon a special verdict, where it appears by the facts found, that the defendant was acting by virtue of his office. Rann v. Pickens, B. R. M. 23 Geo. 3. Dougl. 308. n. If the plaintiff discontinue, the court will, upon an affidavit, that the act for which the defendant was sued, was done by virtue of his office, make a rule upon the master for the taxation of double costs. Devenish v. Mertins, 2 Str. 974. If judgment goes by default, the defendant may enter a suggestion on the roll. Ca. temp. Hardw. 138-9.] (e) All the defendants. Vaugh. 117.

By the statute 21 Jac. 1. cap. 12. § 3. the above statute is made (f) Not
 perpetual, and it is thereby further enacted, " That church- where an
 " wardens, and all persons called sworn men, executing the office action is
 " of churchwardens, overseers of the poor, and others, which brought
 " shall do (f) any thing by their assistance or command, con- against
 " cerning their office, shall have benefit of 7 Jac." churchwar-
 maliciously presenting the plaintiff for incontinency; because merely ecclesiastical, and the statute is in-
 tended only where troubled concerning temporal matters. Cro. Car. 286. Jones 305.

[In cases, under these acts, where it doth not appear on the 1 Str. 47.
 face of the record, that the defendant is entitled to double or Ca. temp.
 treble costs, (as, where he pleads the general issue,) and there is Hardw. 125.
 no particular mode appointed for the recovery of the costs, the Id. 138.
 proper mode, after a nonsuit or verdict for the defendant, is to 2 Str. 1021.
 apply to the court upon an affidavit of the facts, for leave to en- Say. Rep.
 ter a suggestion on the roll. 214.
 3 Will. 442.

Where the defendant is entitled to double costs under these Skin. 556.
 acts, the costs *de incremento*, as well as those assessed by the jury,
 shall be doubled.]

3. Of Costs for and against Informers, and where the Prosecution may be said to be carried on at the Suit of the King.

It seems agreed, that a common informer, upon a popular statute, can in no case recover costs, unless they be expressly given by such statute; for it is certain, that he cannot recover them at common law, for that doth not give costs in any case; neither can he recover them by force of the statute of *Gloucester*, which gives the plaintiff his costs only in cases in which he shall recover his damages. 2 Keb. 781.
 Roll. Abr.
 544.
 Lutw. 200.
 Vent. 133.
 Salk. 206.
 pl. 4.
 Moor. 65.
 3 Lev. 374.
 2 Inst. 288.

[But on a *bonâ fide* composition of a penal action by leave of the court, the plaintiff may be allowed a reasonable sum for his costs. And, on motion, the defendant may pay the penalty into court with costs. Wood *qui tam* v. Johnson, 2 Bl. Rep. 1157. Walker v. King, Bull. Ni. Pri. 197.]

Jones, 447.
Cro. Car.
559.
2 Inst. 289.
Roll. Abr.
516, 517.
574.
Ma. ch. 56.
111. Bl. 13.

But in an action on a statute by the party grieved, for a certain penalty given by such statute, the plaintiff within the statute of *Gloucester* shall recover costs, because such penalty is intended him by way of recompence for his particular damage by the offence prohibited; and if he could recover that only, and no more, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it.

3 Lev. 374.
3 Keb. 781.
Lutw. 200.
Carth. 230.
231. The
Corporation
of Plymouth
v. Collings,
adjudged.
And the like
point said to
have been adjudged Mich. 5 W. 3. between the corporation of Cutlers and Busslin. 12 Mod. 46. Comb
224. Skin. 363, pl. 6. 367. pl. 14. Holt. 172.

So, in debt for a penalty of 20*l.* brought by a corporation *qui tam*, &c. upon a private act of parliament concerning the *New River Water* brought to *Plymouth*, where the action was brought for diverting the water-course, contrary to the statute; after verdict for the plaintiffs it was holden, that though this was on a new and penal law, yet being brought by the parties injured, and for a certain penalty, they should have their costs; otherwise, where the action is brought by a common informer.

Roll. Abr.
574.
Lutw. 200.
10 Co. 116.
Cro. Car.
560.
Salk. 206.
pl. 4.

But no costs shall be recovered in an action on a statute, which gives no certain penalty to the party grieved, but only his damages in general, &c. if such a statute be introductive of a new law, and give a remedy in a point not remediable at the common law; but there is not that inconvenience in this case as in the former, because no certain sum being specified, the jury may give the plaintiff full satisfaction by way of damages.

As to costs against *informers*, by the 24 *H. 8. cap. 8.* it is enacted, "That the defendant shall recover no costs on nonsuit or verdict, when the plaintiff sues to the king's use."

[This statute extends to all actions by common informers, whether such actions may be grounded on statutes made prior, or subsequent, to it. Law q. t. v. Worriall, 1 Wils. 177.]

But by the 18 *Eliz. cap. 5.* which is made perpetual by 27 *Eliz. cap. 10.* it is enacted, "That if any informer or plaintiff, on a penal statute, shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein by verdict or judgment of law; that then in every such case, the same informer or plaintiff shall yield, satisfy, and pay unto the party defendant, his costs, charges, and damages, to be assigned by the court, in which the same suit shall be attempted, &c."

And. 116.
Sav. 50, 51.
Cro. Eliz.

In the construction of this statute it hath been holden, that it extends only to common informers, who are to have the whole benefit of the penalty, and not where the penalty is given to the party grieved, or where part is given to the king, and part to him who will sue for it (*a*).

177.
2 Leon. 116.
Salk. 30.
2 Salk. 543.
pl. 1. Ld. Raym. 27.

[*(a)* But prosecutors *qui tam* are looked upon as common informers; and shall pay costs. Salk. 30. Cowp. 366. And where the defendant obtains a verdict in a *qui tam* information, he shall have costs, although he himself removed the information from the sessions into the court of King's Bench. *Qui tam* by the Town of Dover v. Hodgson, 1 Wils. 139.]

Sid. 311.
2 Keb. 106.
81. [Garland q. t. v. Barton,

Also, it hath been holden, that where judgment is given against an informer, because the court in which he sues has no jurisdiction of the cause, or because the statute on which he grounds his information is discontinued, yet he shall pay costs within the intent

tent of the statute, which shall have a liberal construction, and was intended to prevent all vexatious informations. 2 Str. 1103.]
Vide Hut.
35, 36.

[And it is said, that the entry of a *noli prosequi* by the plaintiff, in a popular action, comes within this statute. 2 Cr. Pr. 469. n.]

By the 18 Eliz. there is a *proviso*, that it shall not extend to any officers that have used to exhibit informations, &c. [But this
must appear
upon the

record, else they will be taken as common informers, and affidavits to the contrary will not be admitted. 2 Ld. Raym. 1333. Bull. Ni. Pri. 334. 4 Ed.]

4. Of Paupers.

[A pauper, in the eye of the law, is one who will swear that he is not worth 5*l.* (a) after all his debts are paid, exclusive of his wearing apparel, and the subject matter of the action. Such a person may, upon petition, and affidavit of his poverty, supported by a certificate of his cause of action, be admitted to sue *in formâ pauperis*; which admission may be either at the commencement of the suit, or afterwards *pendente lite* (b). And being so admitted, an attorney and counsel shall be assigned him; he shall be permitted to carry on the proceedings *gratis* without using stamps (c) or paying fees to the officers of the court, unless he obtain a verdict for more than 10*l.*, and then the officers shall be paid their court fees, and for passing the record, &c.

temp. Hardw. 254. 3 Will. 24. But by order in the Exchequer 1717, the pauper, if admitted after the commencement of the suit, is to give security to pay the costs before admittance. 3 Com. Dig. 389. (c) Stat. 5 W. & M. c. 21. § 14.—An admission to sue *in formâ pauperis* in the court of Chancery is not binding on the officers in the King's Bench; and therefore on an issue out of Chancery to be tried in B. R. there must be a new admission in the latter court. Ca. temp. Hardw. 311. Nor will an admission in one suit entitle a party to commence another suit *in formâ pauperis*. 1 Lill. Pr. Reg. 851.

This indulgence of suing *in formâ pauperis* was given by stat. 11 H. 7. c. 12.; but as the enabling men to commence a litigation without expence, is tempting their resentments with too easy a gratification, it was found necessary to impose a restriction upon it in the following reign, and therefore,]

In the statute 23 H. 8. cap. 15. there is a provision, “That whoever sues *in formâ pauperis* shall not pay costs, but shall suffer such other punishment as the judge of the court shall think fit.”

But notwithstanding this statute, if he be (d) dispaupered, or (e) non-suited, the usual practice is to tax the costs, and for non-payment to order him to be (f) whipped.

(f) But though the usual course in such case is to tax the costs, and if not paid, to whip the plaintiff; yet upon consideration of the circumstances of the case, it is in the discretion of the court to spare both. Sid. 261.—And *per* Holt Ch. Just. on motion to whip a pauper who had been nonsuited, there is no officer for that purpose, nor did I ever know it done. 2 Salk. 506. pl. 1.

[If the pauper do not proceed to trial according to notice, or otherwise misbehave himself, the court will order him to be dispaupered (g): but until this be done, they will not make any rule about the costs (h).]

(h) 2 Str. 878. 3 Will. 24. Fitzg. 161.; but see Cal. Pr. C. B. 47. 1 Str. 420. *semb. contr.*

(a) Anon. Fitzg. 161. So, if a person, after having failed in one

action in which he sued *in formâ pauperis*, commence a second action for the same cause, but not as a pauper. *Goodtitle v. Mayo*, B. R. H. 29 G. 3. *Hulleock*, 214. *See*, if after a nonsuit in an action in which he did not sue as a pauper, he commence a second action for the same cause *in formâ pauperis*. *Weston v. Withers*, 2 Term Rep. 511.

Anell v. Slowman, 8 Mod. 314.

Eq. Abr.

125. 3 Bl. Comm. 400.

(b) But *vide*

Preced.

Chan. 219.

Where a

pauper hav-

ing a decree

to recover

with costs,

it was held, on motion, *per curiam*, to be unreasonable that any one should have more costs than he was out of pocket; and thereupon it was ordered that the plaintiff and his solicitor make oath before the master, and what they swore they had paid, or were to pay, was to be allowed, but no further.

Hulleock,

270. Anon.

Barnes, 328.

Ruled *acc.*

in a late case

by Gould, J.

Imp. Pr.

P. C. 2d

ed. 567.

2 Keb. 378.

Semb. *acc.*

See vide

Comb., 77.

11 Mod. 84.

Pr. Reg. C. P.

405 *contr.*

(c) But a person may be admitted to defend an

indictment *in formâ pauperis*; because the prosecutor not being entitled to costs in criminal proceedings, he cannot be prejudiced by such admission, which is in effect nothing more than ordering the officers of the court to take no fees. *Rex v. Wright*, Ca. temp. Hardw. 211. 253. 2 Str. 1041. S. C. 6 Mod. 88. S. P. And by stat. 2 Geo. 2. c. 28. § 8. a person arrested on a *capias*, or information relating to the customs, upon making affidavit before a judge, or commissioner appointed to take affidavits, that he is not worth 5*l.* exclusive of his wearing apparel, and upon petition to the court, may at the discretion of the court, be admitted to defend such action or information *in formâ pauperis*, in like manner, and with the same privileges, as other poor subjects are permitted to sue for the recovery of their rights.

with the same privileges, as other poor subjects are permitted to sue for the recovery of their rights.

The court will not stay proceedings in a second action, until the costs are paid of a nonsuit in a prior action for the same cause (a); nor, if the pauper should succeed in the second action, will they deduct the costs of the first, out of those recovered in the second.

Where a plaintiff, at the time of a nonsuit, was a pauper, the descent of lands to him afterwards, shall not have relation back, so as to make him liable to the costs of the nonsuit.]

A. brought a bill *in formâ pauperis*, to which the defendant put in plea, and demurrer, which were both over-ruled; and it was insisted upon that he should have no costs, being at none; but my Lord *Sommers*, after long debate, and inquiry of all the antient counsel and clerks, who agreed that he should have costs, ordered him his costs (b) like other suitors; for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant, but to the pauper.

[A defendant in a civil (c) action cannot be admitted to defend *in formâ pauperis*; because no person can be admitted either to sue or defend as a pauper, but under some act of parliament; and the statutes of 11 H. 7. and 23 H. 8. contain no provisions on behalf of defendants, but merely enable plaintiffs to sue in that form. And if the courts had a discretionary power, without the direction of a statute to admit persons in civil suits to proceed *in formâ pauperis*, they would in effect possess a power of dispensing, in many instances, with the operation of the statutes relative to costs.]

(c) But a person may be admitted to defend an indictment *in formâ pauperis*; because the prosecutor not being entitled to costs in criminal proceedings, he cannot be prejudiced by such admission, which is in effect nothing more than ordering the officers of the court to take no fees. *Rex v. Wright*, Ca. temp. Hardw. 211. 253. 2 Str. 1041. S. C. 6 Mod. 88. S. P. And by stat. 2 Geo. 2. c. 28. § 8. a person arrested on a *capias*, or information relating to the customs, upon making affidavit before a judge, or commissioner appointed to take affidavits, that he is not worth 5*l.* exclusive of his wearing apparel, and upon petition to the court, may at the discretion of the court, be admitted to defend such action or information *in formâ pauperis*, in like manner, and with the same privileges, as other poor subjects are permitted to sue for the recovery of their rights.

(F) Of Costs in Replevin.

Jones, 434.

IN replevin the plaintiff had damages at common law, and costs by the statute of *Gloucester*, as a consequence of such damage, but the avowant or defendant in replevin had no costs, although in many cases where an avowry or conufance was made, and a return prayed, the defendant was an actor.

(d) If defendant avows for 36*l.* for a

But now by 7 H. 8. cap. 4. "Every avowant and person that makes conufance, or justifies as bailiff in replevin, or second deliverance, for any rent, custom, or service, if (d) their avowry, conufance,

“conuſance, or juſtification be found for them, or the (a) plain-
“tiffs otherwiſe barred, ſhall recover their damages and coſts, as
“the plaintiff ſhould have done if he had recovered.”

year and a
half's rent,
and the
plaintiff

pleads payment of 12 *l.* and there is another iſſue for the 24 *l.* and the firſt iſſue is found for the plaintiff,
and the ſecond for the defendant, the plaintiff ſhall have no coſts or damage; but the avowant ſhall have
a return, damages and coſts. Cro. Jac. 473. (a) Extends not to a nonſuit, Jones 423.

Alſo, by the 21 *H. 8. cap. 19.* by which the lord may avow, as
in lands within his fee, without naming any tenant in certain, it
is further enacted, “That (b) every avowant or other perſon (c)
“making juſtification or conuſance, as bailiff or ſervant in replevin,
“or ſecond deliverance, (d) for rents, cuſtoms, (e) ſervices, (f) da-
“mage-feaſant, or for other (g) rent or rents, if the avowry, conu-
“ſance, or juſtification, be found for them, or the (b) plaintiff be
“nonſuit, or otherwiſe barred, they ſhall recover damages and
“coſts, (i) as the plaintiff ſhould have done.”

(b) Extends
to executors
that avow;
by 32 *H. 8.*
c. 2. a ſub-
ſequent ſta-
ture. 2 *Roll.*
Rep. 457.

(c) Extends
not to a de-
fendant that
claims pro-

perty. Hard. 153. [Nor to pleas of *prisel en autre lieu*, upon which the writ is abated. Com. Rep. 122.
2 *Ld. Raym.* 788.] (d) The defendant avowed the taking as a ſtray within his manor; and whether he
ſhould have coſts, Haſlop and Chaplain, *dubitatur*; but judgment reverſed for another cauſe. Cro. Eliz.
257. 329. Owen 13. but Jones 433. cited, and ſaid, the judgment was reverſed becauſe damages and
coſts were given; and that this reaſon is entered upon the roll. — Not if an avowry for an amerce-
ment in a leet, &c. Porter v. Grey. Cro. Eliz. 300. Moor 893. Cro. Jac. 520. 2 *Roll.* Rep. 75.
But releaſing his damages, he had coſts by 4 Jac. 1. & vide Jones 424. 435. But Cro. Eliz. 257. 329.
It has been the conſtant practice ſince this act to give coſts and damages. [See too ſtat. 3 & 9 *W. 3.*
c. 11.] — Where the avowry was for a penalty upon breach of a bye-law. Cro. Jac. 497. 572.
Jones 421. 435. March 29. (e) Where the avowry for relief *dubitatur*, becauſe no ſervice, but a
flower thereof only, and goes to executors. Cro. Jac. 28. Cro. Car. 422. 513, 534. Jones 423.
2 *Roll.* Rep. 75. — But upon a diſtreſs for a heriot, no queſtion but coſts ſhall be paid. Cro. Jac. 23.
Yet vide Cro. Eliz. 257. 329. (f) But he ſhall recover damages for the treſpaſs at the time of the taking
only, and not for the mean time. Daſh. 52. (g) Extends not to an avowry for a *nomine poenæ*.
(h) Therefore 2 *Sid.* 155. where the defendant avowed for a rent-charge, and the plaintiff, after evi-
dence, was nonſuited, the court took the verdict of the jurors, who found for the defendant, and aſſeſſed
damages and coſts. [(i) *Qu.* Whether they ſhall have both damages and coſts, where there are ſeveral
iſſues, and ſome are found for, and the others againſt the defendants? Cro. Jac. 473. 2 *Roll.* Rep. 37.
Brownl. 173. 2 *Lutw.* 1190. Under 4 *Ann.* c. 16. § 5. they ſhall pay coſts on the ſpecial avowries
found againſt them. Stone v. Forſyth, Dougl. 709. n. Where ſome iſſues are found on each ſide, and
the judge does not certify that the plaintiff had probable ground for pleading thoſe matters in regard to
which any iſſues are found for the defendant, the latter is entitled to have the coſts in reſpect thereof de-
ducted out of the general coſts of the verdict. Dodd v. Joddrell, 2 *Term.* Rep. 235.]

[By the 17 *Car. 2. c. 7. § 2.* (extended to *Wales* and the coun-
ties palatine by 19 *Car. 2. c. 5.*) the defendant obtaining a judg-
ment thereon for the arrears of rent, or value of the goods
diſtrained, is entitled to his full coſts of ſuit.

By the 11 *Geo. 2. c. 19. § 22.* if the defendant avow, or make
cogniſance according to that ſtatute, upon diſtreſs for rent, relief,
heriot, or other ſervices, and the plaintiff be nonſuit, diſcontinue
his action, or have judgment againſt him, the defendant ſhall re-
cover double coſts of ſuit.]

[This ſtatute
doth not ex-
tend to a
ſeizure for a
heriot-cuſ-
tom. Lloyd

v. Winton, 2 *Will.* 28. Barnes, 148. *S. C.*]

(G) Of Coſts in a Writ of Error.

AS there were no damages given in a writ of error, but only a Cro. Eliz.
reverſal or affirmance of the former judgment, there could be 588.
no coſts, either at common law or by the ſtatute of *Glouceſter*:
hence it was thought neceſſary to make a ſtatute to redreſs the
miſchiefs that aroſe from writs of error, in order to delay execu-
tion. Therefore,

(a) By the statute of 19 H. 7. c. 20., this act is confirmed; and it is enacted, that the same should from thenceforth be put in execution.

By the (a) 3 H. 7. cap. 10. "Whereas plaintiffs or defendants had been delayed of execution, for that defendants, &c. against whom the judgment was given, or others bound thereby, brought error to reverse the judgment, to the intent only to delay execution, it is enacted, That if any defendant, &c. or others bound thereby, before execution had, bring any writ of error in delay of execution, then, if judgment be affirmed, or the writ of error discontinued through the default of the party, or the plaintiff therein be nonsuited in the same, the party against whom the writ of error is sued, shall recover his costs and damage, for the delay, and wrongful vexation, by the discretion of the justices before whom the writ of error is sued."

Sid. 357.

(b) Where a judgment in C. B. in Ireland, was affirmed in B.R., there,

as also on a writ of error in B. R. here, and likewise on a writ of error in the House of Lords here, and a *capias ad satisfaciend.* in B. R. here, as well for the costs given by the courts in Ireland, as for those given by the court here, was superseded as irregular. Carth. 460. Ld. Raym. 427. 5 Mod. 421. Salk. 321. pl. 6.

(c) Vent. 166.

Mod. 77.

(d) 3 Lev.

375.

Carth. 281.

4 Mod. 244.

[But where executors and administrators would be liable to pay costs in the original action, they will also be liable in error. Williams v. Riley, 1 H. Bl. 567. Caswell v. Norman. Ibid. n. 2 Barnard. 450. 2 Str. 977.]

Cro. Jac.

636. Cro.

Car. 401.

Vent. 88.

There are no costs by this act where execution is executed, for then there can be no delay of execution.

Hence, there can be no costs in a writ of error upon a judgment in ejectment, where execution was executed as to the costs and damages, though not as to the term.

Smith v.

Smith, Cro.

Car. 425.

Winne v.

Lloyd,

1 Lev. 146.

Raym. 154.

But vide Graves v. Short, Cro. Eliz. 617. 659. Ferguson v. Rawlinson, 2 Str. 1084. Andr. 113. cont. (e) But in a *quare impedit*, though therein no costs are recoverable, but damages only, the party shall have costs. Dyer 77. Cro. Car. 145. 175.

2 And. 123.

Cro. Eliz.

588.

This statute extends to a writ of error in the Exchequer chamber, though given by a subsequent statute.

Also, the more effectually to prevent defendants from bringing frivolous writs of error, by the 13 Car. 2. stat. 2. cap. 2. it is enacted, "That if any prosecute a writ of error for reversal of any judgment *after verdict* in the courts of *Westminster*, counties palatine of *Chester*, *Lincoln*, or *Durham*, or of the great sessions in *Wales*, and the judgment is affirmed, they shall pay "double

“ double costs; popular actions upon penal laws (except debt for tithes) indictments, informations, &c. excepted.”

But as these statutes do not extend to cases where judgment is given for the (a) defendant, and the plaintiff brings a writ of error, it was thought necessary to remedy this inconvenience: And therefore,

considered in some cases as a plaintiff, shall not have costs within those statutes which are to be construed strictly, because costs are in nature of a penalty. Carth. 179. 4 Mod. 7. Show. 13. 165. 12 Mod. 1, 2. 2 Ld. Raym. 788. Salk. 205. pl. 1. S. C. [Doug. 709. n.]

By the 8 & 9 W. 3. cap. 11. “ If any action, &c. upon demurrer by plaintiff or defendant, judgment shall be given for the defendant; or if after judgment for the defendant in such action, &c. the plaintiff shall bring error, and the judgment shall be affirmed, the writ of error discontinued, or the plaintiff nonsuited, the defendant shall have judgment for his (b) costs, and execution for the same by *capias ad satisfaciend.*”

this shall not be presumed merely for delay, since the plaintiff keeps possession of nothing by his writ of error.

[By 4 Ann. c. 16. § 25. for preventing vexation, from suing out defective writs of error, it is enacted, “ That upon the quashing of any writ of error, for variance from the original record, or other defect, the defendant shall recover against the plaintiff in error his costs (c), as he should have had, if the judgment had been affirmed, and to be recovered in the same manner.”]

1403. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Though no costs are recoverable in the original action, yet they are payable on quashing a writ of error. Archbishop of Dublin v. Dean of Dublin, 1 Str. 262. But where the defendant in error enters continuances to defeat the writ of error, the plaintiff in error is not liable to costs on quashing it. Gould v. Couthurst, 1 Str. 139. Rejindoz v. Randolph, 2 Str. 834. But though the act of a defendant may occasion the quashing of a writ of error, yet if it be not reprehensible, he shall not pay the costs. Cooper v. Robins, Say. Costs, 207. And none of the statutes give costs on the reversal of a judgment. Wyvil v. Stapleton, 1 Str. 617. 8 Mod. 315.

[(H) Of Costs in a feigned Issue.

WHEN a feigned issue is directed by a court of law, whether in a civil or criminal proceeding, the costs always abide the event of the verdict. But when a feigned issue is ordered by a court of equity, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned to the court that ordered it, where the costs are discretionary.

1 Will. 261. Herbert v. Wilkinson, Id. 324. Say. Rep. 24. S. C. but in the case of *Holkins v. Lord Berkeley*, 4 Term Rep. 402. the court of King's Bench strongly intimated an opinion, that as feigned issues were only granted with leave of the court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent, that the costs should be in the discretion of the court.

Where the issue is ordered by a court of law, on a rule for an information (d), or motion for an attachment (e), the costs of the original rule, or motion, do not in general follow the verdict, but

2 And. 123. Cro. Car. 401. (a) A defendant in replevin, though he is to be continued 12 Mod. 124. 8 Mod. 314. 316. 12 Mod. 523. 2 Ld. Raym. 992. Salk. 194. pl. 3. Comb. 482. 6 Mod. 88. (b) But not for double costs, for

(c) These costs include those of the motion for quashing the writ of error. Cooper v. Ginger, 1 Str. 606. 2 Ld. Raym. 1103. (d) These costs include those of the motion for quashing the writ of error. Cooper v. Ginger, 1 Str. 606. 2 Ld. Raym. 1103.

Still v. Rogers, 1 Lill. Pr. Rep. 344. Palmer v. Williams, Barnes, 130. Rex v. Phillips,

(d) Rex v. Nicholls, Say. Rep. 227.

Thomas v. Powell, 1 Burr. 603. Say, Costs, 144 S. C. (c) Rex v. Griffith, Say. Rep. 253. (a) Thomas v. Powell, 1 Burr. 603. (b) Oldknow v. Wainwright, 2 Burr. 1017. Tidd's Pr. 672-3.

Tempest v. Metcalf, 1 Will. 331. If any one of several issues be found for the plaintiff, he must have his costs.

Williams v. Attorney-General, Burton's Pr. Exch. 248. Where the crown is party, the plaintiff shall not pay costs, though he submit to a *non pros*.

Anon. 2 P. Wms. 68. If an issue be directed out of Chancery to be tried, and the plaintiff give notice of trial, and do not countermand it in time; upon motion, the court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried.]

(I) Of Costs in the several Steps and Proceedings of a Cause.

AS the courts exercise a discretionary power in awarding costs, before there is a final judgment in the cause, it seems difficult to ascertain the several cases in which they will make use of this power; however, it may be observed in general, that the delays or contempts which either party is guilty of, can only be remitted or purged on payment of costs.

12 Mod. 560. As for not going on to trial, inquiry (c), &c. so if the plaintiff moves to amend his declaration, (which is seldom refused whilst the proceedings are in paper,) it must be on payment of costs. [It is laid down in the case here referred to in 12 Mod. that, if upon notice of trial, the defendant draws briefs, retains counsel, and makes ready his witnesses, before that notice is countermanded, upon affidavit thereof, and motion, he shall have such costs as the master shall tax. But it hath been since holden, that if a notice of trial be regularly countermanded, the defendant is not entitled to receive the costs of a witness who resided in London, and, before the countermand was delivered, set out to attend the assizes in the country. Hester v. Hall, Barne, 307. Goodright v. Hoblyn, 11. 293. Pr. Reg. C. P. 303. S. C. — A plaintiff is not liable to costs for not proceeding to trial according to notice, if the delay was the result of inevitable accident, Ogle v. Moffit, Barnes, 133. or occasioned by the neglect of the defendant's attorney. Strong v. Harwood, Say. Costs, 174. (c) Shadford v. Houston, 1 Str. 317. Sutton v. Biyan, 2 Str. 728.] *Vide* title *Amendment*, letter (G).

10 Mod. 88. There are no costs in abatement upon demurrer, because there are no damages given, but only a *respondeas ouster* awarded.

6 Mod. 2. [No costs are allowed to either party on a replader, because it is a judgment of the court upon the pleading; and both parties were in fault to allow an immaterial or insufficient issue to be joined, and therefore, neither of them can have any claim to receive costs from the other.]

1 Leon. 105. But the statutes give costs on a *non pros*, and this even before declaring, and then the plaintiff is demandable, for he is not in court by attorney until he has declared; but since he has put in his

his appearance by attorney, the court will vacate his appearance, if he does not do as he ought to do in declaring; and this sort of nonsuit is as well within the statutes, as when he is demandable at the *nisi prius*: But because the *King's Bench* suffered them to lie three terms without awarding a *non pros.*, therefore,

By the 8 *Eliz. cap. 2.* If upon a *latitat*, *alias*, or *pluries capias* issuing out of the *King's Bench*, the plaintiff does not declare within three days after bail put in, or after declaration shall delay or suffer his suit to be discontinued, or be nonsuit, the court shall award the defendant his costs and damage.

Enlarged to the end of the 2d term, by an order of K. B. made Mich. term 10 G. 2.

Reg. 2. Note (b). [This statute doth not extend to actions brought by executors or administrators, in their representative character. Cro. El. 69. Cro. Ja. 361. If the plaintiff enter a *noli prosequi*, the defendant is entitled to costs upon this statute. Cooper v. Tiffin, 3 Term Rep. 511.]

After a declaration put in by the plaintiff, if the defendant puts in a bar or demurrer, and the plaintiff does not reply, &c. there is a judgment against him on the bar, &c. and costs awarded, because he does not prosecute his writ with effect.

After issue joined or a verdict given, the plaintiff cannot discontinue without leave of the court, which is never granted but upon payment of costs *.

* Qu. if he can discontinue at any time, after suit commenced, without paying costs?

The plaintiff cannot bring a new ejectment without paying the costs of the first.

4 Mod. 374. *Fide tit.* Ejectment.

(B. 3). That if a new trial, or second issue be directed out of Chancery, it must be on payment of costs. 2 Vern. 75. 8 Mod. 225. *Fide tit.* Trial (L).

[It was formerly not usual (a) in any actions, but ejectments, to stay the proceedings in a second action, until the costs were paid in a prior one for the same cause; and, particularly, if the merits did not come in question, on the former trial (b). But of late years, it hath been done, in several instances, on the ground of vexation (c); and in one case (d), where the action was brought by husband and wife, the court stayed the proceedings, until the payment of costs in the former action, at the suit of the husband only; it being for the same demand.

(a) Tidd's Pr. 285. Real v. Macky, 2 Str. 1206. English v. Cox, Cowp. 322. Say. Costs, 251. S. C. Lazarus v. Pritchard,

Barnes, 125. Doe v. Alston, 1 Term Rep. 401. but see Lord Biron's case, 1 Vent. 100. Filmer, 1 Ld. Raym. 697. (c) Welton v. Withers, 2 Term Rep. 511. Gravenor v. Cape, Say. Costs, 245. Melchar v. the Executors of Halfey, Id. 247. 2 Bl. Rep. 741. S. C. (d) Lampley and wife v. Sands, H. 25 Geo. 3. B. R. Tidd's Pr. 285.

(b) Bafs v. Cape, Say. 3 Wils. 149.

So, it was formerly not usual (e), in any actions, but ejectments, or actions *qui tam*, to require security for costs, where the plaintiff resided abroad; for it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now although a plaintiff be not compellable to give security for costs, merely as a foreigner, if he reside in this country, yet, whether he be a foreigner or native, if he reside abroad out of the reach of the process of the court, the proceedings will be stayed till he return, or security be given for the payment of costs (f).]

(e) Real v. Macky, 2 Str. 1206. Lamu v. Sewell, 1 Wils. 266. Maxwell v. Mayer, Say. Costs, 156. 2 Burr. 1026. S. C. Boswell v. Irish, 4 Burr. 2105.

Golding v. Barlow, Cowp. 24. Nuncomar v. Burdett, Id. 158. English v. Cox, Id. 322.

(f) Pray v. Edie,

v. Edie, 1 Term Rep. 267. Fitzgerald v. Whitmore, *Id.* 362. Doe v. Alston, *Id.* 491. The practice of the court of Common Pleas in this respect hath not been altogether uniform: the circumstance of the plaintiff's being abroad, was at one time not thought to be *of itself* a sufficient ground for requiring this security. Parquot v. Eling, 1 H. Bl. 106. But the contrary was afterwards laid down as a settled point to guide the practice of the court in future. Ganesford v. Levy, 2 H. Bl. 118. It seems now, however, that the point is not so entirely settled, as not to admit of being departed from, where an adherence to it would induce serious hardships or inconveniences. Henschen v. Garves, *Id.* 383.—The defendant before he makes this application, must put in bail. De la Preuve v. the Duc de Biron, 4 Term Rep. 697.

*7*d title
Outlawry.

The defendant shall not pay the costs of reversing an outlawry until the plaintiff declares against him; and if the plaintiff be nonsuit, the defendant shall have them again in his costs; and if there be more defendants than one, and they be all outlawed, they shall all be contributory for the costs, and not every one pay the whole costs.

(K) Costs, how assessed or taxed.

Roll. Abr.
517.
[(a) Formerly, if these words were omitted, or even misplaced, in the judgment, it was error. But this is now

AFTER the making of the statutes that introduced costs, it was agreed on as a rule, that the jury should tax the damages a-part, and the costs a-part, that so it might appear to the court that the costs were not considered in the damages; and when it was evident that the costs taxed by the jury were too little to answer the costs of suit, the plaintiff prayed that the officer might tax the costs, and that was inserted in the judgments; and therefore said to be done *ex assensu* of the plaintiff (a), because at his prayer.

helped by 16 & 17 Car. 2. c. 8. § 1., and 4 Ann. c. 16. § 2. And in action of debt, if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, the damages assessed by the court, as well as the costs of the suit, should, in the judgment, be stated to be given *with the assent* of the plaintiff; but the omission of such statement, it seemeth, is aided by 16 & 17 Car. 2. or, at least, may be supplied at any time. Tully v. Sparkes, 2 Str. 868. 2 Ld. Raym. 1570. 1 Barnard. 325. 335. S. C. So, if a manifest miscomputation, or any plain mistake in figures, should appear on the face of the record with regard to costs, it may be amended. 4 Burr. 1589. 1 Roll. Abr. 205. pl. 5.]

7 Mod. 129.
Hullock,
622.

[It is said, that if a judgment be entered up with a blank for the costs, they cannot be afterwards inserted.

Green v.
Cole,
2 Saund.
257.

If the jury assess costs in a case, wherein none are recoverable by law, the judgment should be entered *nullo habito respectu* to such costs.

Stones v.
Tong, Ca.
Pr. C. P. 7.
Ward v.
Snell, 1 H.
Bl. 10. *Vide* 1 Lill. Abr. 472.

The jury ought *ex officio* to give costs in an action in which costs are recoverable by law; but if they omit or refuse to do so, the court will, on motion, order costs to be taxed, and indorsed on the *poslea*.]

10 Co. 117.

If there are several issues found for the plaintiff, or against several defendants, entire costs are given upon the whole pleadings, for that is the whole charge the plaintiff is at.

Keilw. 48.
2 Leon. 177.
Brownl. 3.

So, if in debt the defendant pleads several pleas, upon which they are at issue, and the jury find one issue for the plaintiff, and damages 12*d.* another issue for the plaintiff, and damages 10*d.* and another issue for the plaintiff, and damages 6*d.* and one issue against the plaintiff, they must assess the costs entirely, and

and not according to the damage severally, for every issue found for the plaintiff.

[In an action of *assumpsit*, the plaintiff declared upon two several promises, to which there was the general issue, and at the trial a verdict was found for the plaintiff, and several damages were assessed with entire costs. A writ of error being brought, the judgment was reversed as to the one promise, and affirmed as to the other, and the *entire* costs.]

Upon a *scire facias* on a recognisance in *C. B.* against bail, the plaintiff had judgment for execution upon the recognisance, *Et quod recuperet damna sua occasione dilationis executionis*; upon a writ of error in *B. R.* this was reversed, for the bail are only liable to costs of suit by the statute; and damages, by reason of the delay of execution, are not costs, nor costs of suit, but damage sustained by being so long out of his money, which used to be assessed by allowing the party what lawful interest would have come to him in the mean time; so that costs and damages are different in this case, given for different ends, and assessed by different measures.

If baron and feme join in an action, and a verdict is given for the plaintiffs, and the jury assess damages *ultra misas Et custagia per ipsum* (the baron) *circa sectam suam exposita*, to so much, *Et pro misis Et custagiis illis*, to so much; and thereupon judgment is given, that the baron and feme shall recover the costs and damages; though it is found that the baron only expended and disbursed the money for the costs of the suit, in as much as the feme had nothing, yet the judgment is good, that the baron and feme shall recover the costs; for there cannot be one judgment for the costs, and another for the damages.

[The husband cannot have execution for the costs on a plea of coverture found for the wife defendant, without a *scire facias*.

A demand of costs must be made at the time of serving the rule of court under which they are taxed; and upon an affidavit that the costs were so demanded either by the party entitled to receive them, or by some person by him duly authorized, and that payment was refused, an attachment will be granted in the first instance, and may be moved for the last day of term.

The costs allowed to the plaintiff after obtaining judgment in an action on a simple contract, or for a debt certain, only extend to the time of signing final judgment. In such case, the expences of levying, together with all other incidental charges of the execution, must be paid by the plaintiff, and not by the defendant; for the sheriff can levy on the defendant only the sum given by the judgment. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent on the expences of the execution, which, in that case, must be sustained by the defendant. A defendant, if he prevail, can only levy the amount of his costs, and that, at his own expence.

It was anciently the practice for the court, or one of the judges, to tax the costs and make a special rule for their payment; upon service

Grymston v. Keyner, Cro. Eliz. 527. Mo. 708. S. C. Jacob v. Miles, Cro. Jac. 343. S. P. Salk. 208. pl. 8. 2 Salk. 520. pl. 22. Fanthaw and Morri- son, 6 Mod. 157. S. C. 2 Ld. Raym. 1138. 10 Mod. 306. Roll. Abr. 516. Crusee and Berry, adjudged upon a writ of error. Wortley v. Rayner, Dougl. 637. Barnes, 120. Say. Rep. 48. 1 Burr. 651. 5 Burr. 2686. Hullock, 624. 2 Term Rep. 152. Hullock, 625. 11th. H. C. P. 261. 266.

service of which, and refusal of payment, an attachment issued. But, at this day, costs are taxed in the King's Bench, by the master, and in the Common Pleas, by one of the prothonotaries, upon the attornies or agents of the parties attending them at their respective offices for that purpose. After the taxation, the master, or the prothonotary, marks the amount of the costs on the *posita*, inquisition, or demurrer-roll, as the case may be, when final judgment is said to be signed, and execution may be immediately taken out.

Hullock,
625.

1 Lill. Abr.
470. I.

Where any extraordinary expences have been incurred in a cause, and generally in country causes, an affidavit (in which it is customary for the party entitled to the costs and his attorney to join) stating the particulars of such extra expences, is requisite to enable the proper officer to make an adequate taxation. And it is said, that more than ordinary costs ought not to be taxed, until the attornies on both sides have been heard for their clients, and an affidavit of the costs produced, except where one of the attornies, having had notice of the intended taxation, neglects to attend. It is usual to give such notice to the attorney or agent of the party liable to the costs; but as this is a matter of courtesy, and not of right, it may be prudent, in some cases, to take out a rule from the office of the clerk of the rules in the King's Bench, or of the secondary in the Common Pleas, to be present at the taxation, which, when served on the opposite party, renders it incumbent upon him to give notice.

Thellusson
v. Staples,
Doug. 438.

In the taxation of costs, no allowance can be made for the contingent losses, which the witnesses may have suffered by obeying the *subpoena*.]

Covenant.

COVENANTS, contracts, and agreements, are often used as synonymous words, signifying an engagement entered into, by which one person lays himself under an obligation to do something beneficial to, or to abstain from an act, which if done, might be prejudicial to another.

As the good of society requires a punctual performance of, and that no person should be allowed to rescind and break through his contracts, so the law has provided a remedy by action of covenant*, in which the injured party is to recover damages for the violation of the contract, in proportion to the loss he has sustained.

* Where the contract is by deed.

But here it may be necessary to observe, that where the covenant or agreement is for doing something in *specie*, as conveying lands, executing deeds, &c. the most usual, and indeed the most proper remedy is by bill in Chancery; which court, in cases reasonable, will decree an execution in *specie*, whereas at common law, the party can only be repaired in damages.

But if the matter of the bill is merely in damages, the remedy is only at law, because the damages cannot be ascertained by the conscience of the Chancellor, and therefore must be settled by a jury at law. *Vide Vol. 1. 107. (B).*

But if there be matter of fraud mixed with the damages, as if *A.* sues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction, upon this equitable suggestion, that the covenant was obtained by fraud; if *A.* files his cross-bill for relief upon that covenant, the court will retain it, because the validity of the covenant is disputed in that court, and on a head properly conusable there; and therefore, if the validity of the deed be established, the court will direct an issue for the *quantum* of the damages.

But for the better understanding of this action of covenant, I shall consider,

- (A) Of the Manner, and by what Words an express Covenant is created.
- (B) Of Covenants created by Implication of Law.
- (C) Where an Action of Covenant is the proper Remedy.
- (D) Where there are several Parties: And herein of joint Covenants.
- (E) Of Covenants Real and Personal: And herein of the Persons to whom they shall extend: And herein,
 - 1. Of Covenants which shall extend to the Heir or Executor, so as to be bound by them, though not expressly named.
 - 2. Of Covenants which the Heir or Executor may take Advantage of.
 - 3. Where an Assignee shall be bound by the Covenant of the Assignor.
 - 4. Where the Assignor continues still liable.
 - 5. Where an Assignee shall take Advantage of a Covenant.
 - 6. Of Covenants which bind by Force of the Statute 32 H. 8. c. 34.
- (F) How Covenants are to be construed.
- (G) Where

- (G) Where the principal, and all auxiliary Covenants, shall be said to be void and extinguished.
- (H) What shall be deemed a Breach, or construed a good Performance.
- (I) Where the Breach shall be said to be well assigned.
- (K) Where the Performance shall be said to be well let forth and pleaded.
- (L) What may be pleaded in Bar to the Action.

(A) Of the Manner, and by what Words an express Covenant is created.

(a) 1 Chan. Ca. 294. Leon. 324. [1 Burr. 290. Dougl. 766. (b) A party may also covenant in respect of past transactions. Plowd. 308. So, he may covenant as to time present, for it is the constant language of deed of alienation, that the grantor has lawful power to convey. 3 Wooddes. 86.] (c) Roll. Abr. 518. Brownl. 23. S. C. (d) But it is said, that without the word *agreed*, it would have been only a qualification of the covenant of the lessee. Roll. Abr. 518. 2 Co. 72.

(a) THE law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which shew the parties concurrence to the performance of a future act (b); as, (c) if lessee for years covenants to repairs, &c. *Provided always, and it is agreed, that the lessor shall find great timber, &c.* this makes a covenant on the part of the lessor to find great timber, by the word (d) *agreed*, and it shall not be a qualification of the covenant of the lessee.

40 E. 3. 5. b. Roll. Abr. 518. S. C. So, if A. leases to B. for years, upon condition that he shall acquit the lessor of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term in as good plight as he found them; if he does not leave them well repaired at the end of the term, an action of covenant lies.

Roll. Abr. 518. Bret and Cumberland, adjudged. Cro. Jac. 300. 521. So, these words in a lease of a mill, *and the lessee shall repair the mills as often as need shall require, and shall leave them sufficiently repaired at the end of the term*, make a covenant, (e) because it is the clear agreement of the parties; for otherwise the words, *shall leave, &c.* would have no effect.

3 Bull. 163. Roll. Rep. 359. 2 Roll. Rep. 63. S. C. adjudged. (e) As if A. by indenture agrees to give B. 70 l. for an house, if B. executes one part of the indenture to A., A. may bring covenant for the house. Fordege and Cole. Lev. 274. per cur. Raym. 183. per cur. Sand. 319. for on the part of B., it amounted to a covenant to convey.

Co. 155. Roll. Abr. 418. Moor, 478. If A. leases to B. for life, with a proviso, that if the lessee dies within the term of forty years, that then the executors of the lessee shall have it for so many of the years as amount to the number

number of forty years, to be accounted from the date of the indenture of lease; this *proviso* shall not be a lease, but only a covenant.

If there are articles of agreement between *A.* and *B.* by which it is agreed, upon a marriage intended between *A.* and *C.* that all the stock of *C.* shall remain in the hands of *B.* till *A.* shall make a certain jointure to *C.* *ipso B. annuatim solvendo to A. interesse proinde secundum ratam 8l. per centum, &c.* if *B.* does not pay the said interest, an action of covenant lies against him upon these words, because (a) every (b) agreement by deed is a covenant, otherwise *A.* could not have any remedy for the money.

charged upon *A.* to be paid to *B.* Lev. 47. — Where the words were only by way of recital, that it was intended that a fine should be levied, &c. 2 Mod. 89. 91. 2 Freem. 3. S. C. & vide Leon. 122. (b) Where a man assigns and transfers a chose in action, though nothing passes, yet it amounts to a covenant, that the other shall have the thing. Mod. 113. 3 Keb. 304. Freem. 268. Ld. Raym. 683. [2 Ld. Raym. 1242. 1419. 2 Bl. Rep. 820.]

Roll. Abr. 518, 519. (u) So, where a man acknowledges himself to be accountable to another for all money by him

If *A.* makes a deed to *B.* in these words, *I have in my custody one writing obligatory, in which writing obligatory, one William now standeth bound to the said B. for the payment of 400 l. upon such a day, being the proper money of B. and (c) I will be ready at all times, when I shall be required, to redeliver the same writing obligatory to the same B.; if B. after demands the said obligation of A. and he refuses to deliver it, B. may have an action of covenant upon this deed by force of the words, and I will be ready at all times, when I shall be required, to redeliver the same, &c.*

Hard. 178. adjudged; but the chief baron doubted, if the words had been *teneri & firmiter obligari*; for that these words found in debt, and not in covenant.

Roll. Abr. 519. (c) So, where the words of a deed are, I oblige myself to pay so much money at such a day, and so much at another.

If *A.* enters into a statute to *B.* and afterwards *B.* by his deed covenants, that upon payment of such a sum at a day to come, the statute shall be void, and that he will deliver it in, and cause it to be vacated; if *B.* before the day sues execution upon the statute, *A.* may bring an action of covenant; for though it be true, that a covenant that is to take effect presently is to stand or fall by the operation of law, and no action of covenant will lie; as if a man covenants that a bond shall be void upon doing such an act, or to stand seised, no action of covenant will lie upon these; yet here the last words bind the party to the performance of a future act, *viz. to deliver in the said statute, and cause it to be vacated*, which, without all question, found in covenant.

If *A.* enters into an obligation to *B.* and afterwards *B.* covenants not to sue *A.* without any limitation of time, this amounts to a release, and may be pleaded as such.

Raym. 25. Robinson and Ampton adjudged. Keb. 103. 118. S. C. Sid. 48. S. C.

But if the covenant be temporary, and limited to a certain time; as if it be, that *B.* will not sue for ninety-nine years, &c. this still remains a covenant; and for the violation thereof an action of covenant is the proper remedy, but it cannot be pleaded in bar; so if there be two obligors, and the obligee covenant that he will not sue one of them, this is no release, but only a covenant.

Carth. 64. Comb. 123. 124.

Carth. 64.

A letter of licence containing the words following, *viz. that if the creditor sue within such a time, his debt shall be forfeit*, works a forfeiture

Carth. 64.

a forfeiture by the commencement of the suit, and therefore, may be pleaded in bar to the action.

Roll. Abr.
513. Geary
and Read,
Cro. Car.
128, 129.
S. C. ad-
judged; &
vide Cro.
Eliz. 242.
385.
2 Co. 71.

If there are articles of agreement made by indenture between *A.* and *B.* in which *A.* agrees that *B.* shall have a house in a street in *London*, for certain years; provided, and upon condition, that *B.* shall receive and pay the rents of the other houses of *A.* in the same street mentioned in a schedule annexed to the indenture; and it is further agreed, that *B.* for his labour in collecting the said rents, shall have the overplus of the rents, over and above such a certain sum; this is not any covenant on the part of *B.* to bind him to receive and pay the rents mentioned in the schedule; but the *proviso* and condition will only make the estate of *B.* void in the house.

Cro. Jac.
281. Brisco
and King,
adjudged;
Yelv. 206.
S. C. ad-
judged; the
proviso be-
ing, that if
A. paid for
B. 40*l.* to
C. &c., for
the word
payment, in
the obliga-
tion, shall
have refer-
ence to such

If *A.* by deed enfeoffs *B.* provided that, if *A.* pays money to *B.* by a day, the feoffment shall be void, and covenants to save harmless from incumbrances and arrears of rent, and to make further assurance; and after *A.* enters into an obligation conditioned for the performance of all (a) covenants, payments, articles, and agreements comprised in the deed; if *A.* pays not the money, yet the bond is not forfeited; for there being no covenant to pay the money, it is a *proviso* in advantage of the feoffor, that, if he paid the money, he should have the land again; so that it is in his election to pay the money or lose the land, which is a sufficient loss to him, and the word *payment*, in the bond, hath reference to the covenant to save harmless from arrears of rent.

payments only, as by the deed are compulsory, not such as are voluntary; for otherwise the obligation and condition would be repugnant, and contrary to the deed. 1 Brownl. 113. S. C. and Bulst. 156. S. C. adjudged 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. (a) Otherwise, if the condition of the bond had been for the performance of all covenants and conditions in the deed. Tooms v. Chandler, 2 Lev. 116. 3 Keb. 454. adjudged, and in 3 Keb. 460. Judgment is given for the defendant unless the plaintiff discontinue.

Roll. Abr.
517. (b) So,
a writ of co-
venant lies upon the king's patent, though there is no counterpart sealed by the lessee, who is to be charged. Cro. Jac. 240. Bulst. 21. Cro. Jac. 399. 521. 3 Bulst. 163. Roll. Rep. 359. 2 Roll. Rep. 63. Poph. 136.

An action of covenant may be brought as (b) well on a deed poll, as on a deed indented.

Salk. 197.
pl. 3. Green
and Horn,
adjudged.

But though covenant lies as well on a deed poll as upon a deed indented, yet the parties must be named therein; and, therefore, where in covenant the plaintiff declared, that *J. S.* being arrested at his suit, and in the custody of the bailiff, he, the defendant, promised and engaged to bring in the body of *J. S.* into the custody of the bailiff such a day; on demurrer it was holden, that the action would not lie, the plaintiff not being named in the agreement, and no averment *dehors* could avail him.

(B) Of Covenants created by Implication of Law.

THERE are some words, which of themselves import no express covenant, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law, and will as effectually bind the parties, as if expressed in the most explicit terms.

As if a man (a) makes a lease for years of land, by the words (b) *concessit* or *demisit*, these import a covenant, and if the lessee or his assignee are (c) evicted, they may bring an action thereupon.

word grant. 2 Roll. Rep. 399. Palm. 388. (b) Carth. 98. S. P. admitted.—Where a man *assignavit* & *transposuit* all the money that should be allowed by any order of a foreign state, to come to him in lieu of his share in a ship. Mod. 113. Said by Hale, though it cannot be assigned, yet this amounts to a covenant that he shall have all the money; & vide 4 Co. 81. Cro. Eliz. 214. 2 Leon. 104. [(c) Bet, in such case, the eviction must be by one who hath a title, though it is otherwise, it hath been said, where there is an express covenant. 2 Leon. 104. Cro. El. 214. 2 Brownl. 161. though it seems now to be settled, that an express covenant in the most general terms shall be restrained to lawful interruptions, 3 Term Rep. 584. Vaugh. 118. The distinction between *implied* covenants by operation of law, and *express* covenants, is, that *express* covenants are taken more strictly. Per Ld. Mansfield, 3 Burr. 1639. Hence, an express covenant to pay the rent is binding on the tenant, at law, in every event, and in every state and condition of the premises. Paradine v. Jane, All. 27. Monk v. Cowp. 2 Str. 763. Belfour v. Weston, 1 Term Rep. 312. Yet if, in such case, the thing demised could not be enjoyed, a court of equity would give relief. Brown v. Quilter, Ambl. 1620.]—So, if the cattle of the lessee are distrained by the lord paramount, he may have covenant against his lessor. Raym. 257.

So, if a man leases for years, reserving rent, an action of covenant lies for non-payment of the rent, for the (d) *reddendo* of the rent is an agreement for payment of the rent, which will make a covenant.

Also, if a man leases for years by the words *demise*, *grant*, &c. and in the deed there are several covenants on the part of the lessor, and he enters into a bond conditioned for the performance of all the covenants, &c. in the deed; this extends as well to the covenants in law, as express covenants.

But if a man leases for years by the words *demise*, &c. and the lessor covenants that the lessee shall enjoy during the term, without eviction by the lessor, or any claiming under him; this express covenant qualifies the generality of the covenant in law, and restrains it by the mutual consent of both parties, that it shall not extend farther than the express covenant.

If a man leases to me by indenture the land of (e) J. S. of which J. S. is seised at the time, upon which I enter, and he re-enters, I shall have a writ of covenant upon this indenture, though I was not in the land by the lease, but by estoppel, for the lessor is estopped to say that I was not in of his lease.

he leases to me my own land, and I am ousted by a stranger. Cro. Jac. 73. Roll. Abr. 520. 871.

So, if a man leases to me land of J. S. of which J. S. is seised at the time, I shall have a writ of covenant before entry upon

48 E. 3.
2. b. 7.
Roll. Abr.
519.

5 Co. 17. a.
resolved.
(2) So, if an
assignment
thereof be
made by the

Roll. Abr.
519.
Style, 387.
Carth. 135.
(d) So, the
words yield.

4 Co. 80. b.
Nokes and
James, ad-
judged.

4 Co. 80;
Cro. Eliz.
674.
Yelv. 175.

Roll. Abr.
520. Cro.
Jac. 73.
S. C. ad-
judged.
(e) So, if
by indenture

Roll. Abr.
520. Holder
and Taylor.

2 Brown. 22. S. P. Hob. 12. S. C. But *wide in Roll.* the case immediately following; which seems *cont.*, and that if a man leases land for years, and a stranger enters before the lessee enters he shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action. Roll. Abr. 520. Owen 105. S. P. *per Fenner.* * *Sed. qu.* If this is law? and if he may not maintain an action on the covenant, ex, rels, or implied, that he shall hold and enjoy for the term?

Owen, 104. Roll. Abr. 519. (a) And therefore, in case of a lease of a house, together with the goods, it is usual to make a schedule thereof, and affix it to the lease, and to have a covenant from the lessee to re-deliver them at the end of the term; for without such covenant the lessor can have no remedy but trover or detinue for them after the lease ended.

But if a man leases certain goods for years by indenture, which are evicted within the term, yet he shall not have a writ of covenant; for the law does (a) not create any covenant upon such personal thing.

(b) If for life. So, in the case of a grant of an (b) inheritance, by the words *enfeoff, grant, &c.* the law does not create a covenant.

2 Jones, 102. *dubitatur.*

Carth 9th. 48. Coleman and Sherwin, adjudged. Salk. 137. pl. 1. Show. 77. S. C. Also, if two or more join in making a lease by the words *concessimus, &c.* this creates a covenant in law, for the breach of which, all of them shall be jointly sued; but if the breach be the personal tort of one of them, as if one of them enter and oust the lessee, the action may be brought against him alone; for it is unreasonable, that the others should suffer for the personal wrong of their companion.

Comb. 165. Vent. 26. 44. Pomfret and Riccrossi, adjudged. *cont.* Twisden in B. R. Sid. 427. S. C. adjudged; *cont.* Twisden in B. R. But Sand. 321. 322. S. C. reversed for Twisden's reasons in *Cam. Sacc.*; and Hale said, that if I lend one a piece of plate, and covenant he shall have the use thereof, yet if the plate be worn out by ordinary use, without any default, no action of covenant lies against me. — But if one by deed grants a water-

course, and after stops it, an action of covenant lies against him. Sand. 322. For by Twiſden, this is a voluntary misfeasance.—So, if I lease a house, and therewith grant estovers out of such a wood, if I cut down the wood, so that no estovers can be had, the lessee may bring covenant against me. (c) But if *A.*, in consideration that *B.* will build a mill upon the land, and a water-course through the land, demises to *B.* by the words *dedi & concessi*; and after *A.* stops the water-course, yet no action of covenant lies; for the covenant extends not to a thing which was not *in esse* at the making of the lease. Leon. 278. (d) *Vide* Roll. Abr. 519. & 2. (e) *Vide* F. N. B. 145.

If *A.* leases a house to *B.* excepting two rooms, and free passage to them, and the lessee assigns to *J. S.* who disturbs the lessor in the passage; this, though a covenant in law, shall bind the lessee; for where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, &c. covenant lies for a disturbance; but if the disturbance had been in the rooms excepted, covenant would not have lain.

Carth. 232.
Bush and
Cole, ad-
judged.
Salk. 196.
Show. 388.
S. C. & *vide*
Moor, 553.
Cro. Eliz.
657.

(C) Where an Action of Covenant is the proper Remedy.

IF *A.* for valuable consideration, promise by his deed not to do a certain thing, no action upon the case lies upon this promise, but a writ of covenant.

So, if *A.* recovers a debt against *B.* and *B.* pays him the condemnation, upon which *A.* releases all actions, executions, &c. to *B.* by deed, and by the same deed promises that he will withdraw and discharge all writs of execution against *B.* upon the said judgment, yet no action upon the case lies upon this promise; because it is made by deed, and so he ought to have a writ of covenant.

Roll. Abr.
11. Cro.
Jac. 505.

under seal be dissolved, and a balance struck, and an express promise be made to pay it, an *assumpsit* may be brought. *Foster v Allanson*, 2 Term Rep. 479. So, if there be an express promise to pay a balance struck, though the articles, containing a covenant to account, are subsisting. *Moravia v. Levy*, *Id.* 483. n.]

Roll. Abr.
517. Be-
mish and
Hilderſly,
adjudged.
Cro. Jac.
505. S. C.
[But if ar-
ticles of
partnership

If a man leases for years, reserving rent, he may have an action of covenant, as well as debt, for the rent arrear: so, if *A.* grants a rent to *B.* payable at a certain feast yearly, and covenants to pay the rent at the feast; an action of covenant lies for non-payment, though he might have an action of debt for it.

2 Stra. 1089.
12 Mod.
371. *Vide*
title Debt,
and Actions
in general.
Roll. Abr. 517, 518.

It seems by the better opinion, that upon the eviction of a freehold, no action of covenant will lie upon a warranty, either in deed or in law, for the party might have had his *warrantia charta*, or voucher; but in case of a lease for years upon an eviction, there can be no other remedy*.

Brownl. 19.
Keb. 821.
Vide Hob. 4.
Yelv. 139.
Noy, 131.
*The course
now is, to

introduce an express covenant for quiet enjoyment, against all persons claiming, and that the estate is free from incumbrances.

(D) Where there are several Parties: And herein of joint Covenants.

5 Co. 18. b. **I**F *A.* covenants to do an act for the benefit of two or more, and
 Slingsbey's *A.* breaks his covenant, one of them alone (*a*) cannot main-
 Hob. 172. tain covenant against him, for then might he be doubly or trebly
 2 Leon. 27. charged for the same breach.
 But where a covenant may be joint or several, *vide* 2 Roll. Abr. 149. Skin. 401 pl. 35. (*a*) In an indenture between *A.* and *B.* of the one part, and *C.* of the other part; among other covenants, there is one thus, viz. It is agreed between the parties, that *C.* shall enter into a bond to *B.* to pay him 100*l.* at a day; in an action for non-performance, *A.* and *B.* must join. Yelv. 177.

5 Co. 19. a. So, if *A.* covenants to do an act for the benefit of *B.* and *C.*
 Show. 8. and enters into a bond to them *Et cuilibet eorum* for performance;
 Comb. 155. yet this being a joint interest, each cannot bring a separate action, but two may bind themselves severally to pay money, or if jointly and severally bound, the obligee may sue which he pleases.

Sid. 107. If *A.* covenants with *B.* that *A.* or his son, or either of them, shall work with *B.* at, &c. *B.* paying to each of them so much, &c. and *B.* requests the son to work with him, &c. if he doth not, the covenant is broken, for *B.* had the election to require both, or any one of them, to work with him.

Comb. 115. If an agreement be entered into between several fidlers, that they
 Spencer and would not play, &c. asunder, unless on my *Lord Mayor's Day*,
 Durant. &c. and they bind themselves in 20*l.* each to the other jointly
 (b) But *vide* and severally, and one only brings covenant, and assigns the
 Skin. 401. breach, that the defendant played *ad quandam tabernam*, &c. this
 pl. 35. and is naught, for they ought all to have joined, the interest being
 Carth. 98. joint; and it is (b) repugnant and contradictory, for four persons
 Comb. 163. to bind themselves one to the other jointly and severally.
 * In this case it is to be presumed the others who did not join in the action, were equally interested with him who sued, and therefore they ought to have joined in the action.

Lilly v. [Where a covenant is joint and several, in an action against
 Hedges, one only, the breach may be assigned in the neglect of both.
 1 Str. 553.
 8 Mod. 166. S. C.]

Enys v. If two joint lessees covenant jointly and severally, and one of
 Donni- them die, such covenant will be binding upon his executors, not-
 thorne, withstanding he should die before the commencement of the
 2 Burr. term, and the whole interest must necessarily survive to his co-
 1197. lessee.

Duke of If lessees covenant jointly and severally at the beginning of
 Northum- their covenants, these words extend to all their subsequent cove-
 berland v. nants, notwithstanding the intervention of covenants on the part of
 Errington, the lessor.]
 5 Term
 Rep. 522.

(E) Of Covenants Real and Personal: And herein, of the Persons to whom they shall extend; and herein,

1. Of Covenants which shall extend to the Heir or Executor, so as to be bound by them, though not expressly named.

IN every case where the testator is bound by a covenant, the executor shall be bound by it, (a) if it be not determined by his death. 48 E. 3. 2. Bro. Covenant, 12. S. C. Cro. Eliz. 553. Same rule *per Curiam*; and so Dyer, 14. pl. 69. (a) *Viz.* where it was to be performed by the person of the testator, the executor cannot perform it. Cro. Eliz. 553. & *vide* 2 Mod. 268. — [But an executor, it is said, is not chargeable upon a covenant implied. Swan v. Searles, Moor, 74. & *vide* Porter v. Swetnam, Styl. 407. Gilb. Covenants, 327.]

If *A.* be (b) tenant for life, the remainder to *B.* in fee, and *A.* by indenture demise, &c. to *C.* for fifteen years, and after *A.* die, and *B.* enter upon *C.*, yet *C.* shall have no action of covenant against the executors of *A.* for the covenant was but (c) during the term, which determined by the death of the tenant for life. And. 12. adjudged. Moor, 74. pl. 204. Bendl. 150. S. C. Dyer, 257. S. P. by three

judges against one, who differed from the others, because the lease was by indenture, which is a matter of conclusion; but if it had been by deed poll, he agreed with the rest. Brownl. 22. S. P. adjudged. (b) So, if tenant in tail demise, and die without issue. And. 12. 1 Leon. 179. Cro. Eliz. 257. & *vide* Lit. Rep. 334. (c) So, if the lessee had granted, bargained, and sold all his estate to another (admitting there was, by these words, a warranty implied), yet it determines with the estate. Cro. Eliz. 157. Leon. 179.

If a man covenant that *A.* shall serve *B.* as an apprentice for seven years, and die, if *A.* depart within the term, a writ of covenant lies against the executor of the covenantor, without naming. 48 E. 3. 2. Bro. Covenant, 12. S. C.

If a man be bound to instruct an apprentice in a trade for seven years, and the master die, the condition is dispensed with, for it is personal; but if he were likewise bound to find him with meat, drink, clothes, and lodging, this the executors are obliged to perform. Sid. 216. Keb. 761. 820. Lev. 177.

[In general, the heir shall not be charged, unless expressly named. If indeed the lessee be ousted by the heir himself, it seems an action of covenant will lie against him; though not if he be ousted by an elder title from the lessor. Touchst. 173. Dy. 257.]

Hence, it is necessary in an *assumpsit* against the heir upon a promise to pay money due upon the ancestor's bond, to aver that the heirs of the obligor were bound. Barter v. Fox, 2 Saund. 136.]

2. Of Covenants which the Heir or Executor may take Advantage of.

Covenants real, or such as are (d) annexed to estates, shall descend to the heir of the covenantee, and he alone shall take advantage of them. 42 E. 3. 4. And 55. (d) *Words*, of covenants in gross. Palm. 538. — Also, for a breach in the time of the covenantee, the action shall be brought by his

his executor, though the covenant was with him, his heirs, and assigns only. Vent. 175. 2 Lev. 26. adjudged.

2 H. 4. 6. b. As if an abbot and convent covenant to sing for the covenantee
5 Co. 18. and his heirs in such a chapel, his heirs at all times shall have a writ of covenant for the not doing thereof.

2 Lev. 92. If a man leases for years, and the lessee covenants with the
Lougher and lessor, his executors and administrators, to repair, and leave it in
Williams, good repair at the end of the term, and the lessor dies, &c. his
Skin. 305. heir may have an action upon this covenant; for this is a cove-
pl. 7. S. C. nant that runs with the land, and shall go to the heir though
cited. he is not named; and it appears that it was intended to continue
after the death of the lessor, in as much as his executors, &c.
are named.

Brudnell v. [But if the lessor were only tenant for life, a lease for years
Roberts, made by him, absolutely determines upon his death, and the heir
2 Wils. 143. cannot take advantage of the covenants in the demise.]

3. Where the Assignee shall be bound by the Covenant of the Assignor.

Roll. Abr. The assignee of a term is bound to perform all the covenants
521. Cro. annexed to the estate; as if *A.* leases lands to *B.*, and *B.* cove-
Eliz. 457. nants to (*a*) pay the rent, repair houses, &c. during the said term,
Moor, 399. and *B.* assigns to *J. S.* the assignee is (*b*) bound to (*c*) perform the
5 Co. 24. covenants (*d*) during the life of the first lessee, though the as-
S. C. signee be not named, because the covenant runs with the land
(*a*) Where being made for the maintenance of a thing *in esse* at the time
the assignee shall be of the lease made.
chargeable
with a no-

mine pane incurred after assignment, vide Cro. Eliz. 383. Moor, 357. pl. 486. Goldsb. 129.
(*b*) By the common law, but without question by the statute of 32 H. 8. c. 37., Cro. Eliz. 457.
(*c*) Lev. 109. Sid. 157. Raym. 80. S. P. (*d*) During the term. Moor, 399., & vide Cro.
Eliz. 457. S. P. by two judges against two (*e*) When the covenant extends to a thing *in esse*, parcel
of the demise, it is *quasi* annexed to the thing demised, and runs with the land, and shall bind the
assignee, though not expressly named. 5 Co. 15. b. Goldb. 270.

5 Co. 15. But if *A.* leases for years to *B.*, and *B.* for himself, his execu-
Spencer's tors and administrators, covenants with *A.* to build a wall upon
case. part of the land demised, and after *B.* assigns, the assignee is not
bound by this covenant, for the law will not annex the covenant
to a thing not *in esse*.

5 Co. 15. But if *B.* had covenanted for him and his assigns to build the
per Cur. wall, &c. this would have bound the assignee, because it is to
[And there- be done upon the land, and the assignee is to have the benefit
fore, it should seem, thereof.

that the co-
venantee would be entitled in equity to a decree for a specific performance of a covenant to build.
City of London v. Nash, 3 Atk. 515. 1 Vez. 12. But see the case of Lucas v. Comberford, 3 Br.
Ch. Rep. 166.]

Bally v. [If a lessee of tithes covenants for him and his assigns, that he
Wells, will not let any of the farmers in the parish have any part of
3 Wils. 25. the tithes, this covenant runs with the tithes, and binds the
assignee.]

If lessee for years covenants for him and his assigns to rebuild and finish a house within such a time, and after the time expired, the lessee assigns over the premises, the house not being built and finished according to the covenant; this covenant shall not bind the assignee, because it was broken before the assignment; *aliter*, if broken after; as if the lessee had assigned before the time expired.

Salk. 139.
pl. 5. Ld.
Raym. 388.
per Holt,
Ch. Just.
3 Burr.
1271. 1 Bl.
Rep. 351.
S. P.

Also, though the covenant be for him and his assigns, yet if the thing to be done be *merely collateral*, and no way concerning the thing demised, the covenant shall not bind the assignee; as if it be to build an house upon other land of the lessor, or (a) to pay a collateral sum:

5 Co. 15.
Fer Cur.
(a) Cro. Jac.
438. S. P.
adjudged.

So, if a man demises sheep or other personal things for a certain time, and the lessee covenants, for him and his assigns at the end of the term, to deliver such sheep, &c. or the price of them, and the lessee assigns them over, the assignee shall not be bound by the covenant; for it is but a (b) personal contract, and there is not (c) such privity as between lessor and lessee of land and his assigns.

5 Co. 16. b.
17. a.
(b) So, of a
lease of a
fair, wine-
licence, &c.
Hard. 88.
—But
where such
an assignee

may be made liable in equity, *vide* 2 Vern. 423. (c) If A. having land charged with the payment of a fee-farm rent, grants part of the land to B., and covenants that the same shall be discharged of the said rent, and after grants the residue of the land to C., this shall not be taken as a covenant-real, which shall in equity charge the other land granted to C. with the whole rent. Hard. 87.

So, (d) if a man leases lands for years (e) with a stock of cattle, and the lessee for him and his assigns covenants to deliver the stock at the end of the term.

5 Co. 17. a.
3 Will. 27.
(d) A man
possessed of

a tavein for six years, leases to another for three years; and it was covenanted, that during the three years *quolibet mense* the lessee should give an account to the lessor of the wine which he sold, and should pay unto him, for every ton so sold, so much; and after the lessor grants the remaining three years to another: the covenant being collateral, it passes not by the assignment of the three years, Godb. 120. Moor, 243., though the covenant was to account to the lessor or his assigns. (e) As in Owen, 139. Leon. 42. Godb. 113.

If lessee for years for himself, his executors and administrators, covenants with his lessor to leave fifteen acres every year for pasture, *absque cultura*, and after the lessee assigns; the assignee, though not named, must perform the covenant, because it is for the benefit of the estate, according to the nature of the soil: but a collateral covenant, as to build *de novo*, &c. shall not bind him, unless named.

Cro. Jac.
125. ad-
judged.

If A. demises to B. several parcels of land, and the lessee covenants for him and his assigns to repair, &c. and after the lessee assigns to D. all his estate in parcel of the land demised, and D. does not repair that to him assigned, the lessor may have an action of covenant against D. the assignee.

Roll. Abr.
522. Cro.
Car. 221.
S. C. ad-
judged, be-
cause this
covenant is

deviseable, and follows the land, with which the defendant is chargeable by the common or by statute law. Jones, 245. S. C. adjudged. — So, if the lessor had granted the reversion of part to one, and of another part to another, they might have brought an action of covenant. Lev. 109. Sid. 157. Raym. 80. Kitchen and Buckley.

If a man leases for years, and the lessee covenants for him and his assigns, to pay the rent so long as he and they shall have the possession of the thing let, and the lessee assigns, the term expires,

Still. 40-
Bromfield
and Sir John
Williamson.

[2. the form of action ?]
(b) If a lease for years, with covenants to repair, assigns

and the assignee continues the possession afterwards; an action of covenant (a) will lie against him for rent behind after the expiration of the term; for though he is not an assignee (b) strictly according to the rules of law; yet he shall be accounted such an assignee as is to perform the covenants.

to J. S. by way of mortgage, and J. S. never enters, equity will not compel him to repair, though he had the whole interest in him; and though it was his own folly to make an assignment of the whole term, when he should have taken a derivative lease, by which means he would not be liable at law. 2 Vern. 275.— But such an assignee, though he never entered, and had lost his mortgage money, was by law compelled to pay the rent; and having sued in equity, could have no relief. 2 Vern. 374. [But this case was overruled in *Eaton v. Jaques*, Dougl. 455., where it was determined, that covenant will not lie against a mortgagee of a term, though the mortgage be forfeited, till he takes actual possession. It is otherwise indeed in the case of an assignee under an absolute indefeasible assignment of the whole interest in the term; for there actual entry is not necessary to make him chargeable. *Walker v. Reeves*, id. 461. n.]

Carth. 519.
Tilney and
Norris, ad-
judged, Ld.
Raym. 553.
Salk. 309.
pl. 13.

If A. leases to B., and B. covenants to repair, &c. and he assigns to J. S. who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare that he made a lease to B. &c. *cujus status & residuum termini annorum, &c. devenit, &c. per assignationem* to the administrator.

4. Where the Assignor continues still liable.

Bro. Cove-
nant, 32.
Roll. Abr.
522. S. C.
Jones, 223.
S. P. per Cur.
(c) He may
charge both, but execution shall only be against one of them; for if he takes both in execution, he that is last taken shall have an *audita querela*. Cro. Jac. 523.

If a lessee covenants that he and his assigns will repair the house demised, and the lessee grants over the term, and the assignee does not repair it, an action of covenant lies either against the assignee at common law, because this covenant runs with the land; or it lies against the lessee, (c) at the election of the lessor.

Roll. Abr.
522. Cro.
Jac. 309.
521 S. C.
adjudged,
that it lay
against the
executor of
the lessee.
Roll. Rep.
359. 2 Roll.
Rep. 63.

So, if a man leases for years, rendering rent, and the lessee covenants for him and his assigns to repair the house during the term, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and after the covenant is broken, notwithstanding the acceptance of the rent from the assignee, yet an action of covenant lies against the first lessee, for the lessee hath covenanted expressly for him and his assigns, and this personal covenant cannot be transferred by the acceptance of the rent.

Poph. 136. Godb. 276. Cro. Car. 188. 580. Jones, 223. Sand. 240. Brownl. 20. Style, 300. 2 Mod. 139. Sid. 402 447. 2 Keb. 643. [But debt for the rent in such case would not lie. *Wade* the cases *supra*, and 1 Freem. 336., Cro. Jac. 309. *Wadham v. Marlow*, B. R. M. 1784. And if the covenant be merely implied by law, the lessor's acceptance of the assignee will entirely discharge the lessee. 1 Sid. 447. Cro. Jac. 523.]

And if the covenant be merely implied by law, the lessor's acceptance of the assignee will entirely discharge the lessee. 1 Sid. 447. Cro. Jac. 523.]

3 Lev. 233.
Edwards
and Morgan,
adjudged,
Carth. 178.
S. C. cited.
(d) Brownl.
20. Sid. 447. S. P.

So, if A. leases to B. rendering rent, and B. covenants to pay it, and after B. assigns to C. and A. grants the reversion to D., and D. after accepts rent from C. yet for non-payment at another day, D. may have an action against B. it being upon an (d) express covenant.

Knight v.
Freeman,
Raym. 393.
1 Vent. 329. 331. T. Jones, 109. [In this case of Knight and Freeman, the assignment was fraudulent,

Also, an assignee, who assigns over, is liable, and shall pay the rent which incurred due before, and during his enjoyment.

fraudulent,

fraudulent, and the fraud was averred, and upon that ground the decision proceeded. But in a later case, this circumstance, it is said, would not alter the case at all, but that immediately upon the assignment, the assignee is discharged. *Lekeux v. Nash*, 2 Str. 1221. Bull. N. Pri. 159. Be the rule of law upon this point what it may, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the land. *Treacle v. Coke*, 1 Vern. 165. Whether they will, in order to secure the future rents under any circumstances, refrain an assignee from assigning to a beggar, or insolvent person, was considered, but not determined, in the case of *Philpot v. Hoare*, 2 Ack. 219. Ambl. 480. S. C. See this point examined in *Fonbl. Eq. Tr.* 351. n.]

But in covenant against *A.* as assignee for non-payment of rent, he may plead, that before any rent was due and payable, viz. on such a day, he granted and assigned all his term and estate to *J. S.* who by virtue thereof entered, and was possessed for the residue of the term; and this shall be a good discharge, without alleging any notice of the assignment, or that the lessor accepted *J. S.* as his tenant.

S. C. 3 Lev. 295. S. C. Show. 340. S. C. 12 Mod. 23. S. C. Holt, 73. pl. 1. S. C. S. C. *Boulton v. Canon*, 1 Freem. 326. S. P. *Cooke v. Harris*, 1 Ld. Raym. 368. *Buckly*, 1 Lev. 215. S. P.

[Although all the estate and interest of a lessee be divested out of him and assigned by act of parliament, yet, without express words of discharge, he is still liable upon his covenant for the rent.]

Hence an assignment under a commission of bankrupt will not discharge the lessee from his express covenant. *Mills v. Auriol*, 1 H. Bl. 433. affirmed in error, 4 Term Rep. 94.

5. Where an Assignee shall take Advantage of a Covenant.

As an assignee shall be bound by a covenant real annexed to the estate, and which runs along with it, so shall he take advantage of such; and therefore if the lessor covenants to repair, or if he grants to the lessee so many estovers as will repair, or he shall burn within his house during the term; these, as things appurtenant, shall go with it into whose hand soever it comes.

40. [But in order to make a covenant run with the land, it is not sufficient that it be concerning the land; there must also be a privity of estate between the covenanting parties. If therefore a mortgagor and mortgagee of a term make a lease, in which the covenants for the rent and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his assignor's interest in the land, and therefore do not run with it. *Webb v. Russell*, 3 Term Rep. 323. But such action may be maintained by the mortgagor himself. *Stokes v. Russell*, id. 678., affirmed in error, 1 H. Bl. 562.]

So, if a man leases lands to another by indenture, this covenant in law, created by the word *demise*, shall (a) go to the (b) assignee of the (c) term, and he shall have an advantage of it.

5 Co. 17. b. S. P. resolved. (a) So, of tenant by statute-merchant, &c. of a term, &c. though they came to the land by act in law. 5 Co. 17. a. — But not to an assignee of a lease by estoppel only. *Moor*, 419. Cro. Eliz. 373. (b) The assignee of the assignee, the executors of the assignee, the executors or administrators of every assignee, are all comprised within this word *assigns*. 5 Co. 77. b. Carli 519. Ld. Raym. 555. Salk. 309. pl. 13. (c) When the estate passes, though by parol, the warranty and covenants follow it, and the assignee of the estate shall have the benefit thereof. Cro. Eliz. 373. 436.

But if one by indenture leases a house for forty years, and the lessee covenants with the lessor, that he will sufficiently repair the house

Carth. 177.
Tovey and
Pitcher,
adjudged.
Salk. 80.
pl. 1.
2 Vent. 228.
S. C. 232.
1 Salk.
4 Mod. 71.
1 Salk. 81.
Keightley v.
Hornby v.
Houlditch,
Andr. 40.
1 Term
Rep. 93. n.
S. C.
Roll. Abr.
521.
5 Co. 17. b.
Godb. 270.
Moor, 242.
pl. 380.
Preced.
Chan. 39.
Roll. Abr.
521.
Dyer, 257.
4 Co. 80.
5 Co. 17. b. S. P. resolved. (a) So, of tenant by statute-merchant, &c. of a term, &c. though they came to the land by act in law. 5 Co. 17. a. — But not to an assignee of a lease by estoppel only. Moor, 419. Cro. Eliz. 373. (b) The assignee of the assignee, the executors of the assignee, the executors or administrators of every assignee, are all comprised within this word *assigns*. 5 Co. 77. b. Carli 519. Ld. Raym. 555. Salk. 309. pl. 13. (c) When the estate passes, though by parol, the warranty and covenants follow it, and the assignee of the estate shall have the benefit thereof. Cro. Eliz. 373. 436.
Moor, 27.
pl. 83.
Skern's
case, ad-

judged by
three judges
against one,
who held,
that the pos-
sibility was
inherent to
the land and
term.

5 Co. 18.
Co. Lit. 384.
b. S. P.

Roll. Abr.
521. Middle-
more and
Goodal,
Cro. Jac.
503. 505.
Jones, 406.
S. C.

Moor, 185.
per Cur.

Leon. 61.
Maschall's
case, ad-
judged.
Moor, 242.
pl. 380.
S. C. ad-
judged.
(a) But an
assignee shall
not have an
action upon
a breach of
covenant
before his
time. Cro.
Eliz. 863.
3 Leon. 51.
2 Vent. 278.
— But upon a breach after his time, though his estate is determined, he may. Roll. Rep. 80.
Owen, 152. 2 Bull. 281.

Cro. Eliz.
599. 617.
Gouldf.
175. S. C.
(b) So,
where the
lessor cove-
nants to
make a new lease at the end of the term, and the lessor grants over his reversion. Moor, 150. And, 82.
Cro. Car.
137.
Jones, 242.
S. C.

house during the term, and that the lessor may enter every year to see if the repairs are done; and if upon view of the lessor it be repaired according to the agreement, that then the lessee shall hold the house for forty years after the first term ended; and the lessee grants to another *totum interesse, terminum & terminos quæ tunc habuit in tenementis*, and after, the first term ends, the assignee shall not take benefit of this agreement.

Upon equality of partition, if one coparcener covenants to acquit the other and her heir of suit, the assignee of the land shall have benefit of this covenant.

If *A.* seised of lands in fee, conveys it by deed indented to *B.* and covenants with *B.* heirs and assigns, to make any other assurance upon request, for the better settlement of the land, &c. and after *B.* conveys it to *C.* who conveys it to *D.* and after *D.* requires *A.* to make another assurance according to the covenant, and he refuses, *D.* shall have an action of covenant in this case against *A.* by the common law, as assignee to *B.*

If *A.* by deed enfeoffs *B.* of certain lands, reserving rent, fealty, and suit of court, and by the same deed grants, that if the feoffee shall be distrained, vexed, or charged for other rents or services, then he may enter and distrain for his amends in other lands; this is annexed to the estate of the land, and shall go with it to every assignee.

If *A.* leases an house to *B.* for years, who covenants to repair, and that *A.*, his heirs, executors, and administrators, may at all times enter, and see in what plight the same is; and if upon such view any default shall be found in the not repairing, and thereof warning shall be given to *B.*, his executors, &c. then within four months after such warning such default shall be amended; and after, the house in default of *B.* becomes ruinous, and *A.* grants the reversion to *C.* who upon view of the house gives warning to *B.* of the default, &c. if it is not repaired, *C.* may have an action as assignee of *A.* against *B.* though the house became ruinous before *C.* was entitled to the reversion; (a) for the action is not founded upon the ruinous estate of the house, and the time when it first happened, but for not repairing within the time appointed by the covenant after the warning.

If lessee for years covenants to leave the houses in good repair at the end of the term, and the lessor grants his reversion to another, (b) though this covenant is not to be performed during the term, yet for a breach thereof the grantee of the reversion may bring an action, and there cannot be a more apt covenant to run with the land.

If *A.* leases lands to *B.* for 200 years, and by the same deed covenants for himself, his heirs, and assigns, with *B.*, his executors, and assigns, that if *B.* is disturbed for respice of homage, or enforced

enforced to pay any charge, or issues lost, that he shall withhold so much of his rent as he shall be enforced to pay, and *A.* grants his reversion to *C.*, and *B.* assigns the term to *D.*, *D.* may take the benefit of this covenant against *C.*, for it runs with the land.

6. Of Covenants which bind by Force of the Statute 32 *H. 8. c. 34.*

By the 32 *H. 8. c. 34.* reciting, "Whereas divers have leased manors, &c. or other hereditaments (*a*) for life or lives, or years, by writing, containing certain conditions, covenants, and agreements, as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and whereas by the common law, no stranger to any condition or covenant could take advantage thereof, by reason whereof all grantees of reversions, and all grantees and patentees of the king, of abbey lands, could have no entry or action for any breach, &c. it is enacted, That all persons, bodies politick, their heirs, successors, and assigns, which have, or shall have any grant of our (*b*) said lord the king, of any lordship, &c. rents, tithes, portions, or other hereditaments, or any reversion thereof which belonged to the monasteries, &c. or which belonged to any other person, &c. and also all other persons, (*c*) (*d*) being (*e*) grantees or assignees, (*f*) to, or (*g*) by our said lord the king, or to, or by any other person or persons, and the heirs, (*h*) executors, successors, and assigns of every of them, (*i*) shall and may have (*k*) like advantage by entry for non-payment of rent, or for doing waste or (*l*) other forfeiture; and the (*m*) same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases against the lessees and grantees, their executors, administrators, and assigns, as (*n*) the (*o*) lessors and grantors, their heirs or successors, ought, should, or might have had at any time or times."

(*a*) Extends not to gifts in tail, Co. Lit. 215. Cro. Eliz. 863.
(*b*) It extends to his successors, though not named. Co. Lit. 215. a.
(*c*) It extends not to grantees by fine till attornment; for it must be intended of such only as have had all ceremonies requisite by law. Co. Lit. 215. 5 Co. 112, 113.
(*d*) Though after breach, and before the action brought, their estate determines. Roll. Rep. 80.

Owen, 151. 2 Bullst. 281. (*e*) It extends to grantees of part of the estate of the reversion, &c. Co. Lit. 215. a. Godb. 162. Roll. Rep. 80. Owen, 151. 2 Bullst. 181. & vide Leon. 252. Moor, 97. pl. 230. — But not to grantees, &c. of the reversion in part of the land. Co. Lit. 215. (Cro. Eliz. 823. Moor, 90. (*f*) It extends to him that comes in by limitation of an use, though in the post; for coming in by the act and limitation of the party, he is a sufficient grantee, &c. within the statute. Co. Lit. 215. Moor, 98. 4 Leon. 27. 29. — But it does not extend to such as come in merely by act in law, as the lord upon an escheat, alienation upon a mortmain, &c. Co. Lit. 215. b. — Nor to him who is in of another estate. Moor, 876. (*g*) But if a copyholder by licence of the lord leases for years, &c., and after surrenders the reversion to the use of another in fee, who is admitted, yet he is not a grantee, &c. within the act, for he is not privy to the lease made by the copyholder, nor in by him, but may plead a grant of his estate immediately from the lord. Brasier and Beal, Yelv. 222. *per Curiam*, upon the first opening. Cro. Jac. 205. Adjudged by two judges, & vide Cro. Car. 25. 44. Hob. 178. But in the case of Glover and Cope, 3 Lev. 326. it is adjudged, that such surrenders may have an action of covenant by this act. (*h*) Lessee for twenty years leases for ten years, and his lessee covenants, &c., and the first lessee grants his reversion, this grantee is a sufficient assignee within the statute. Moor, 525. 527. Cro. Eliz. 599. 617. 649. Gouldf. 175. Godb. 161. (*i*) Whether this doth not imply that the grantor shall not, 3 Lev. 155. *dubitatur*, & vide Sid. 402. (*k*) But he shall not take advantage of a condition before he has given notice to the lessee. Co. Lit. 215. 5 Co. 113. b. — *Secus*, of a covenant. Godb. 262. Cro. Jac. 476. Bridg. 130. (*l*) *Viz.* by force of a condition incident to the reversion, as rent, or for the benefit of the estate, as for doing waste, not keeping houses in repair, &c., and not for the payment of any sum in gross, delivery of corn, &c. Co. Lit. 215. b. & vide 5 Co. 18. Moor, 159. 243. 876. Owen, 41. And. 82. Raym. 250. Sand. 159. If the *proviso* be to enter for non-payment of a rent, or gross sum by way of a fine, the grantee of the reversion shall not take advantage of it; for the condition cannot be apportioned. Styie, 316. *See*

qu.? (m) The privity of action is transferred, and it may be brought in the county where the covenant was made, though the lands lie in another. Sand. 237. adjudged; but a writ of error was brought in *Cam. Scacc.*, and it was after compounded. Sid. 401. Lev. 259. Vent. 10. & 3 Mod. 338. and *tit. Actions Local and Transitory.* (n) Therefore if the devisee of the reversion before attornment, bargains and sells to another, to whom the lessee attorns, the bargainee may, &c., though his bargainor could not. 5 Co. 113. a. (o) *A.* devises to *B.* for years, rendering rent, upon condition to re-enter for non-payment; and afterwards devises the reversion in fee to another, and dies; the devisee may take advantage of the condition, though there never was any reversion, &c. in the devisor. 2 Leon. 33.

(a) But if lessee for 30 years leases to another for 10, he is no assignee within the statute; for he is not tenant to the first lessor. Moor, 93. pl. 230.

Carth. 289, 290. Midgley and Gilbert v. Lovelace, adjudged.

And by the same act it is enacted, "That all farmers, lessees, and grantees of lordships. &c. rents, tithes, portions, or other hereditaments for years, life or lives, their executors, administrators, and (a) assigns, shall and may have like action and remedy against all persons, bodies politick, their heirs, successors, and assigns, which by grant of the king, or other persons, shall have the reversion of the same lordships, &c. so letten, or any part thereof, for any condition, covenant, or agreement contained in their leases, as the lessees, or any of them, might or should have had against the lessors and grantors, their heirs and successors; recovery in value, by reason of any warranty in deed or law, only excepted."

A. demised a house for a term of years to *B.* who assigned to *J. S.* the lessor devised one moiety of the reversion to *C.* and the other to *D.* who granted the reversion to *J. S.* after which grant *C.* and *D.* brought covenant against *J. S.* for rent due before the assignment by them; and it was holden, 1. That *C.* and *D.* being tenants in common, may at their election join or sever, as well in debt as in covenant, for the rent; but if they sever, they must not each of them make his demand of such a certain sum, which amounts to a moiety; but the demand must be *de unâ meditate* of the whole rent; and if they can count in debt, they may in covenant, and if debt will lie, *a fortiori* covenant. 2. That this action was maintainable for the arrears of the rent, notwithstanding the reversion was out of the plaintiffs; for though the defendant was but an assignee of a term, yet the very privity of contract was transferred by the statute of 32 H. 8. c. 34. which gives the action for and against assignees; and the contract still remains, though the privity of estate is gone.

(F) How Covenants are to be construed.

Moor, 458. 8 Co. 83. Sir Richard Pexhall's case.

(b) Lev. 102. Hookes and Swain, Sid. 151. K. b. 511. S. C.

(c) If I co.

ALL contracts are to be taken according to the intent of the parties, expressed by their own words, and if there be any doubt in the sense of the words, such construction shall be made as is most strong against the covenantor, lest, by the obscure wording of his contract, he should find means to evade and elude it; hence, (b) if *A.* covenants with *B.* that, if *B.* marries his daughter, he will pay him 20*l.* per ann. without saying for how long, yet it shall be for the life of *B.* and not for one year only; for by the word *per annum*, the (c) meaning of the parties appears

to

to be, that it should continue longer than one year; and this is the construction that is most strong against the grantor.

of cloth, and I cut it in pieces, and then deliver it, this is a breach; for the law regards the real and faithful performance of contracts, and discountenances all such acts as are done in *fraudem legis*. Raym. 464. — So, if the condition of a bond be to pay 50*l.*, though it is not paid of money, yet it must be so intended. Sid. 151. — But if a man covenants that his son, then *infra annos nobiles*, shall marry the daughter of *B.* before such a day, and he marries her accordingly, but at the age of consent disagrees to the marriage, yet is the covenant performed; for it was a marriage, though subject to be defeated by disagreement, and no other could be had within the time. Owen, 25. adjudged.

If two men lease for years, and covenant that the lessee shall enjoy free from all incumbrances made by them, and, after, the lessee be disturbed by *J. S.* to whom one of the lessors had made a precedent lease; this is a breach, for they shall be taken severally, and not jointly only.

If a man leases for six years, and covenants, that if he shall be disposed to lease the land after the expiration of the term of six years, that the lessee shall have the refusal; and within the six years he leases to another; this is no breach, because (*a*) out of the words of the covenant.

B. for six years, and covenants, that he shall enjoy it during the term without interruption, discharged from tithes, and after the six years he is sued for tithes, this is a breach; for the meaning was, that he should be freed from suits, and the payment of tithes; and a suit after the expiration of the term, is as prejudicial, as if before. Cro. Eliz. 916. 2 Brownl. 22.

If a man lease for nine years by indenture, dated 1 Jan. 16 Car. 2. and covenant to save the lessee harmless from all evictions during the term, but this deed be not delivered till 1 Jan. 17 Car. 2. if he be in possession and evicted before the delivery, this is a breach; for during the term, shall be construed during the term in computation, and not only from the time of the delivery of the deed, when it first commenced, in point of interest.

If *A.* leases three messuages to *B.* for forty-one years, and *B.* covenants to pull them down, and erect three other in their place, *ac etiam de tempore in tempus* to maintain the messuages agreed to be erected in sufficient repair, *ac etiam* to repair the pavements, &c. *ac etiam dicta premissa, & domos superinde fore erect.*, at the end of the term to leave in good repair; and after *B.* pulls down the three houses, and builds five, he must leave them all in good repair at the end of the term; for though by the first covenant he is bound only to repair, &c. the messuages *agreat. fore erect.*, yet by the last covenant he is obliged to leave in good repair *domos superinde erect.* indefinitely, which extends to all houses which shall be built upon the premises during the term.

that the subsequent matter, concerning leaving the houses in good repair, must be restrained to, and understood of, those agreed to be built.

So, if a man takes a lease of a house and land, and covenants to leave the demised premises in good repair at the end of the term, and he erects a messuage upon part of the land, besides what was before, he (*b*) must keep or leave this in good repair also.

121. For it is a continuing covenant; and though the house had no actual, yet it had a potential being at the time of the lease.

venant to deliver so many yards the real and *fraudem legis*. Raym. 464. — So, if the condition of a bond be to pay 50*l.*, though it is not paid of money, yet it must be so intended. Sid. 151. — But if a man covenants that his son, then *infra annos nobiles*, shall marry the daughter of *B.* before such a day, and he marries her accordingly, but at the age of consent disagrees to the marriage, yet is the covenant performed; for it was a marriage, though subject to be defeated by disagreement, and no other could be had within the time. Owen, 25. adjudged.

Noy, 86. Meriton's case. Laich. 161. and Poph. 200. S. C.

Godb. 335. & vide 2 Roll. Rep. 332. 347. S. C. (*a*) If *A.* leases land to

Sid. 374. Lewis and Hilliard.

3 Lev. 264. Doule and Earl. 2 Vent. 126, 127. S. C. adjudged; because taken as several covenants; but Rolfeby doubted, it seeming to him to be all one covenant, and

3 Lev. 265. per Curiam. (*b*) S. P. adjudged between Brown and Blunden, Skin.

Lant v.
Norris,
1 Burr. 287.

[But where in a building and repairing lease, the lessee covenanted to lay out a given sum in erecting and rebuilding messuages or tenements, or some other buildings upon the ground and premises; and from time to time, &c. all and singular the said messuages and tenements so to be erected, with all such other houses, edifices, &c. as should at any time or times thereafter be erected, &c. to repair, &c.; and the said demised premises, with all such other houses, &c. so well repaired, &c. at the end, &c. of the term to deliver up, &c. it was holden, that the covenant to repair extended only to the new erections.]

Carth. 135.
Giles and
Hooper.

If a lease be made for years, rendering 80*l.* *per annum* rent, free and clear from all manner of taxes, charges, and impositions whatsoever, the lessee is bound to pay the whole rent without any manner of deduction, for any old or new tax, charge, or imposition whatsoever.

Brewster v.
Kidgil,
Salk. 198.
pl. 4.
Lo. Raym,
378. S. C.
12 Mod.
169 171.
S. C.

So, where *A.*, by deed, dated 1649, granted a rent-charge of 40*l.* *per ann.* to *B.* and his heirs, and on the same deed there was an (a) indorsement, that the rent was to be paid clear of all taxes: by the 3 *W. & M.* 4*s.* *per pound* is laid upon land, and power given to the tenant to deduct 4*s.* in the pound, with a *proviso*, not to alter the covenants or agreements of parties; it was holden, that such a covenant, if made in the year 1640, would not have freed the rent-charge from the taxes imposed by those acts, because there were no such parliamentary tax in being, or known at that time; but because there were such taxes in the year 1645, which was before the grant, therefore this covenant must be construed to extend to them.

Comb. 424.
467. S. C.
Carth. 438.
S. C.
1 Mod. 358.
S. C.
(a) Which
must be presumed to have been made before the deed was executed, and so parcel thereof. Carth. 439.
per Cur.

Bridges v.
Hitchcock,
1 Br. P. C.
522.

[In a demise of corn-mills, there was a covenant on the part of the lessor, that "if the lessee, his executors, &c. should before the expiration of the term, be minded to renew, then, upon application, &c. the lessor, his heirs or assigns, should grant such further lease, as should by the lessee, his executors, &c. be desired, without any fine to be demanded therefore, *and under the same rents and covenants only* as in the then lease;" and the question was, Whether there must be a covenant for renewal again in the second lease? The court of Exchequer were of opinion, that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the House of Lords, their decree was affirmed.

Furnival
v. Crewe,
3 Atk. 83.

Again, in a lease for three lives, the lessor covenanted, that he, his heirs, &c. should and would (in consideration of a certain sum to be paid to him, &c. at *Crewe Hall*, or at the place where the said hall then stood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more lease or leases, *under the same rents and covenants* which were expressed in the then lease, and so to continue the renewing of such lease or leases to the lessee, or his assigns, paying as aforesaid to the lessor, his heirs or assigns, the sum before mentioned for every life so added or renewed from time to time. Lord Hard-

wicks

wicke held this to be a covenant of perpetual renewal, and decreed a new lease to be granted to the assignee of the original lessee with a covenant inserted in it to that effect.

Again, in such a lease, the lessor had covenanted, that if the lessee, his heirs, &c. should be minded upon the falling in of any of the lives, to surrender the demise and take a new lease; and thereby add a new life to the then two in being, in lieu of the life so dying, that he the lessor, his heirs, &c. upon payment of so much for every life so to be added, in lieu of the life of every of them so dying, would grant a new lease for the lives of the two persons named in the former lease, and of such other person, as the lessee, his heirs, &c. should appoint in lieu of the person named in the preceding lease, as the same should respectively die, *under the same rents and covenants. There had been successive renewals from the time of the first lease; and in every lease the like covenant for renewal had been inserted.* The court of King's Bench held, that the lessors by *their own acts* construed this to be a covenant for perpetual renewal.

may be a fraud upon the covenant. *Clifton v. Walmesley*, 5 Term Rep. 564.

But where in a lease for years determinable upon lives, the covenant was, that the lessor would upon the death of any of the appointees (by name) add a new third life upon payment of 200*l.* within six months; or upon the death of two of them (by name) within six months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new lease or grant for any three new lives to be nominated and appointed by the lessee, his executors, &c. for the like term as was thereby demised, *at and under the like rent, covenants, and agreements therein contained*; Lord Camden was of opinion, that the lessors were not under any obligation to grant any further lease than for three new lives only, and that the lessee was not entitled to have any covenants inserted for any further renewal; the words of the covenant not obliging the lessors to grant a new lease, but upon the death of some one of the persons named in that lease; and they being all dead, no further renewal could be claimed.

So, under a covenant in a lease for twenty-one years, that the lessor, his executors, &c. would, at the end and determination of the said term of twenty-one years, execute a new lease of the demised premises, for the further term of seven years to commence from the end of the said term of twenty-one years, thereby demised, *subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects, as were in and by the then granted indenture of lease mentioned and expressed*, in case the lessee, his executors, &c. should desire the same; the lessee, his executors, &c. first giving twelve months notice in writing to the lessor, his heirs or assigns, of his or their desiring such further term of years as aforesaid; Lord *Thurloque* declared the lessee entitled to a lease for seven years only, it appearing that the lessee himself had put that construction upon it.]

Cook v. Booth,
Cowp. 819.
Where the terms of a covenant are plain and unambiguous, a court of law cannot admit of evidence *dehors*, to explain the intent of the parties, though the conduct of one of them

Ruffell v. Darwin,
2 Br. Ch.
Rep. 639. n.

Tritton v. Foote,
2 Br. Ch.
Rep. 636.

(G) Where the Principal, and all Auxiliary Covenants shall be said to be void and extinguished.

6 H. 4. 1.
Roll. Abr.

522.

(a) But if
he had not
retaken such

IF a man covenants with tenant for life of an house, to find a chaplain to sing, &c. every *Saturday* during the life of the covenantee, if the covenantee surrenders the house, and (a) retakes an estate for years, yet the covenant remains.

estate, 2. Roll. Abr. 55.

Mod. 223.
Boscawen
and Herle,
adjudged,
2 Mod. 138.
S. C.

If *A.* grants a rent-charge to *B.* for the life of *C. habend.* to *B.* his heirs and assigns, to the use of *C.*, and *A.* covenants to pay it *ad usum C.* if the rent is behind, *B.* may have an action of covenant against *A.* for though the rent-charge is executed by the statute, and the power of distraining, as incident thereto, transferred to *C.* yet the covenant being collateral, is not transferred nor discharged, but remains with *B.*

2 Lev. 26.
Lucy and
Levinston,
Vent. 175.
2 Keb. 831.
S. C.

If a man hath good title to lands by virtue of a fine, and sells the same, and covenants with the vendee, his heirs and assigns, that he shall enjoy against him and *B.* and all claiming under them; and after, by an act of parliament, reciting that *B.* had settled this estate upon *C.*, and that certain persons had unduly procured the said fine from her, it is enacted, That the fine shall be void, and that every person may enter as if no such fine had been; and after, one enters, claiming title under *C.*, this is a breach of the covenant; for the act makes no new title, but removes the obstruction of the old; and it was said, that doubtless *B.* was named in the covenant for this purpose, in case this fine unduly obtained should be avoided.

Salk. 198.
Pl. 4.

As to covenants which are repealed or extinguished by act of parliament, the following diversities are laid down, *viz.* Where *A.* covenants not to do any act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the statute repeals the covenant; so, if *A.* covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed; but if a man covenants to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such an act of parliament does not repeal the covenant.

Cro. Eliz.
529. Lee
and Colshill,
2 And. 55.
S. C. by
the report
of which
it appears,
that by the
agreement,

If *A.*, being a custom-house officer by patent, makes *B.* his deputy, and covenants, *inter alia*, to surrender the old patent, and procure a new one to *B.* and himself before a day, and that if *B.* dies before *A.*, that *A.* shall pay 300*l.* to the executors of *B.*, and gives bond for the performance thereof; admitting these covenants void by (b) the 5 *Ed. 6. cap. 16.* the whole bond is void, though some of the covenants are not void or illegal.

B. was to pay 600*l.*, and to allow *A.* 100*l.* yearly for this deputation, and adjudged, because the obligation is one entire act and deed of the party; & vide 2 And. 207, 208. 3 Co. 82. S. C. cited. (b) So, where a sheriff takes a bond in part against 23 H. 6. c. 9., and also for a just debt, the whole bond is void according to the letter of the statute; for a statute is a strict law, but the common law divides according to common reason; and having made that void which is against law, lets the rest

rest stand. Hob. 14. *per Cur.* Moor, 856. Godb. 213. 10 Co. 100. Latch. 143. Mod. 35. Brownl. 282. Vent. 237. Carter, 230. 2 Willf. 351.

If the principal thing to be performed, as the conveying an estate, &c. be void, further covenants which are relative and dependant thereon are so likewise. Sid. 309. Yelv. 19. Style, 357.

So, if lessee for years grants so much of the term as shall be to come at the time of his death, and covenants that the lessee shall enjoy it, although he gives bond for performance of covenants, yet the principal thing, *viz.* the grant, being void for uncertainty, (a) both bond and covenants are void likewise. Lev. 45. Caponhurst and Caponhurst, Raym. 27. S. C.

they are several deeds, yet they make but one assurance, and are but one contract. (a) For tho' 4 H. 7. 6. 20 H. 6. 293. Bro. Obligation, 6. Dyer, 4. 28. Hob. 168.

But where the dean and chapter of *Norwich*, 8 *Eliz.* leased to *B.* for ninety-nine years, and after in 42 *Eliz.* they leased to *C.* for three lives, and covenanted to save him harmless against *B.* if he is disturbed by *B.* he may have an action of covenant against the dean and chapter, though the lease is void, because the covenant is for a thing collateral, as that the lessor is owner, &c. and the covenant was broken immediately upon sealing the lease to *C.* Owen, 136. Waller and the Dean and Chapter of Norwich, Brownl. 21. Moor, 877. S. C. & vide 2 Brownl. 134. 136. 158., &c.

So, where in covenant the plaintiff declared, that the defendant by his deed did grant, bargain, and sell to the plaintiff and his heirs, &c. provided that if the grantor paid so much money, it should be lawful for him to re-enter; and that he covenanted to pay the said money; and the breach assigned was the non-payment of the money; although it was admitted that nothing passed by the deed for want of enrolment, yet the covenant in this case being to pay money, it is a distinct, separate, and independent covenant; and therefore not material whether any estate passed or not. Salk. 159. pl. 5. Ld. Raym. 388. Northcote and Underhill, adjudged.

(H) What shall be deemed a Breach, or construed a good Performance.

IF *A.* enters into a statute to *B.*, and afterwards *B.* by his deed covenants, that, upon payment of such a sum at a day to come, the statute shall be void, and that he will deliver it in, and cause it to be vacated; if before the day *B.* sues execution, *A.* may bring covenant; and it is no objection, that nevertheless *B.* at the day may deliver it in, and cause it to be vacated; for it is an apparent present breach; for after the statute was set a-foot, and had its course, *transit in rem judicatam*, and could not be vacated. Sid. 48. Robinson and Amp-ton, adjudged. Raym. 25. Keb. 103. 118. S. C. The same law, in case of a promise. Roll. Abr. 448.

If *A.* lease to *B.* for twenty-one years, and covenant at any time during the life of *B.*, (b) upon surrender of the old lease, to make a new lease, and after *A.* lease to a stranger, he hath disabled himself, and broken his covenant. 5 Co. 20. 21. Sir Anthony Scot and Main, 2 And. 13. Moor, 452. Cro. Eliz. 450. Poph. 109. S. C. adjudged. (b) So, if the lessee assign his old lease, he disables himself to take benefit of the covenant. Bull. 22.

Raym. 464. If *A.*, being a common brewer, covenants that *B.* shall have seven parts of his grains made in his brewhouse for seven years; Griffith and Geeland, and after *A.* renders them unfit for the use of *B.*, this is a breach. 2 Jones, 191. *S. C.* adjudged. Skin. 39. pl. 8. If one covenants to have all the timber upon the ground at the expiration of a term, and after cuts it down, it is a breach of covenant, though he carry it not away; but if a stranger cuts it down, it is no breach of covenant. Skin. 40. *per Cur.*——So, if a man covenants to deliver a horse, and he poisons him, and then delivers him, this is a breach. Skin. 40. *per Cur.*

2 Jones, 195. If two men, upon sale of their wives lands, covenant that they and their wives have good right to convey lands, and to make further assurance; if one of the women is under age, this is a breach, for she hath not power to convey the estate according to the covenant. Nash and Ashton, adjudged.

2 Vent. 213. If the lessor covenants with his lessee for years, that he quietly and peaceably shall enjoy the land without the impediment or disturbance of the lessor, if the lessor exhibits a bill in Chancery against the lessee, to restrain his committing waste, this is no breach, though the bill be dismissed with costs, because the suit does not relate to his title or possession.

4 Leon. 39. If a parson leases his rectory for years, and covenants that the lessee shall have and enjoy it during the term, without expulsion, adjudged. (a) But if or any thing to be done by the lessor, and after, for not reading the articles, he is *ipso facto* deprived by the statute 13 Eliz. c. 12. the lessee for years, rendering rent, with a condition of re-entry for non-payment, leases and the patron presents another, who ousts the lessee; this is no breach, for he was not ousted by reason of any act done by the lessor, but for a (a) non-feasance; and so it is out of the compass of the covenant. part for a less term, and covenants that his lessee shall enjoy, without impeachment of him, or any other, occasioned by his impediment, means, procurement, or consent, and after he neglects to pay his rent, upon which the first lessor enters, &c., this is a breach. Bull. 182. adjudged.

Owen, 7. Tenant in tail of a rent purchases the land out of which it *per Cur.* issues, and makes a feoffment thereof, and covenants that it is free but *vide* from all former incumbrances; this is a charge, though not *in esse*, Co. Lit. yet in suspense; for if tenant in tail dies, his issue may disfranchise, 389. a. and then the covenant is broken.

Cro. Eliz. If *A.* be tenant in tail, the reversion in the king, and *A.* lease 517. Wood- for years, and covenant that the lessee shall enjoy it against all ruff and all persons, and without the interruption of any, except the king, his Green-wood, heirs and successors, kings and queens of England, and the king adjudged. grant his reversion to *B.*, and *A.* die without issue, and *B.* enter, the covenant is broken, for that extends only to the king and his successors, in which words his patentee is not included.

Cro. Jac. If *A.*, by the means and procurement of *B.*, by fine conveys 657. Butler lands to *B.* and his wife, and the heirs of *B.*, and after *B.* leases and Swin- the same for years, and covenants that the lessee shall quietly en- nerton, ad- joy during the term, without the disturbance of him, his heirs or judged *per* assigns, or of any other person, by or through his means, title or *totam Cur-* procurement, and *B.* dies, and his wife enters, this is a breach, *riam. Palm.* for she claims by the means of the baron; and therefore it is within 339. *S. C.* the covenant. adjudged; *absente*

Chamber- lain, though objected, by his means and procurement, must refer to subsequent acts. 2 Roll. Rep. 236. *S. C. adjournatur.*

(I) Where the Breach shall be said to be well assigned.

IF in an action of covenant the plaintiff declares upon a lease for twenty-one years to the defendant, and that he covenanted to pay 20*l.* per ann. by equal portions, at *Michaelmas* and *Lady-day*, and assigns for breach, that he did not pay the rent *debit. ad præd. separalia festa durante termino*; this breach is (a) sufficiently assigned, and it shall be intended that the rent was not paid at either of those days.

Lev. 73. Coniers and Smith. (a) In covenant for not repairing, the breach was generally alleged, without shewing in what; 1 Brownl. 23. adjudged, it was helped after verdict; so, 2 Mod. 176.; and see Sir T. Jones, 125., where the covenant was to repair all the pales, except those on the west side; and the breach assigned was, in not repairing the pales, *contra formam conventionis*, and held good after verdict, though objected, that the defect might be in the parts excepted. — The breach assigned by the plaintiff should specify the particulars, and he may assign every possible breach, within the meaning of the covenant, and though he proves only *part*, he will be entitled to recover. As to the defendant, if he means to plead, that he did repair, and if the term is ended, that he yielded up the premises in repair, he should pursue the words of the covenant, fully, without regarding the *particulars* assigned by the plaintiff.

If in debt upon an obligation, the condition whereof is of three parts, 1. That he shall serve the plaintiff well; 2. That he shall duly account; 3. That within three months after notice he shall make satisfaction for all losses sustained by his apprenticeship; the defendant pleads performance specially, and the plaintiff assigns for breach, that upon account he was found in arrear 60*l.* which he received and converted to his own use, and so had not served the plaintiff well; this is a good replication, without alleging notice; for though it might be alleged as a breach of the third part of the condition, yet the conversion of the money to his own use, may be alleged as an ill service.

Cro. Eliz. 850. Cutler and Brewster adjudged,

In an action of covenant several breaches may be assigned; otherwise, in debt upon an obligation, conditioned to perform covenants.

Cro. Car. 176. Id. Raym. 106,

But now by the 8 & 9 *W. 3. cap. 11.* it is enacted, “ That in all actions upon any bond or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing, contained, the plaintiff may assign as many breaches as he shall think fit; and the jury, upon trial of such action, may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize, or

[It is now settled, that it is compulsory on a plaintiff to proceed in the manner pointed out by the statute in cases within the provisions of this section, — that he must assign the breach of such covenants as he proceeds to recover a satisfaction for: and if the defend-

ant plead to issue, and the cause go to a jury for trial, the jury, upon the trial of such cause, must assess damages for such of the breaches assigned, as the plaintiff upon the trial of the issues shall prove to have been broken. If this be not done, a *scire facias de novo* will be awarded. *Drage v. Brand*, 2 Will. 377. *Hardy v. Bern*, 5 Term Rep. 510. 636. So, if judgment go by default, he cannot enter up judgment for the whole penalty, as he might have done at common law. *Roles v. Rosewell*, 5 Term Rep. 538. *Goodwin v. Crowle*, Cowp. 357.

—Whether an obligee in a bond of this kind may recover damages beyond the amount of the penalty, is a point which hath not yet received a final adjudication. See *White v. Sealy*, Dougl. 49. *Brangwin v. Perrot*, 2 Bl. Rep. 1190. *Wilde v. Clarkson*, 6 Term Rep. 303., that he cannot. But *Lord Lonsdale v. Church*, 2 Term Rep. 388. *contr.*]

9 Co. 60, 61. *Bradshaw and Salmon*, Cro. Jac. 304. S. C. adjudged, and that the defendant must shew he was seised

“ *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages which the plaintiff shall have sustained thereby, in which writ it shall be commanded to the said justices, &c., that he or they shall make a return thereof to the court from whence the same shall issue at the time in such writ mentioned; and in case the defendant after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff, or his executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution on the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his costs of suit, and all reasonable charges and expences for executing the said execution, the body, lands or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain as a further security to answer to the plaintiff, and his executors or administrators, such damages as shall or may be sustained for further breach of any covenant in the same indenture, deed, or writing contained, upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution shall not be had or awarded upon the said judgment, upon which there shall be like proceeding, as was in the action of debt upon the bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof, upon a writ to be awarded in manner as aforesaid, of such future damages, costs and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid.”

If *A.* leases to *B.* for years, and covenants that he hath full power and lawful authority to lease, &c., and in an action upon this covenant, *B.* says he had (a) not full power and lawful authority to lease, &c., the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the knowledge of the lessor than lessee; and therefore he ought to shew what estate he had at the time of making the lease, that it may appear that he had full power, &c.

in fee, and then the plaintiff must shew a special title in somebody else; but the covenant being general, the general assignment of a breach *prima facie* is good. (a) That he was not lawfully seised in fee of an indefeasible estate. Cro. Jac. 369. & *vide* Raym. 14, 15.

If *A.* leases to *B.* for years, and *B.* covenants to repair during the term, and at the end of the term to leave the premises well repaired, in an action upon this covenant, it may be assigned for a breach, that he did not leave them well repaired at the end of the term; and if the defendant pleads, that at the end of the term he delivered them up well repaired, then if the plaintiff will assign a breach, he ought to shew particularly in what part it was not repaired, so that the defendant may give a particular answer thereto; but it was said that in a declaration in covenant, it sufficeth to assign the breach as (a) general as the covenant is*.

Cro. Jac. 171. Hancock and Field.

(a) Cro. Jac. 661. S. P. * See *vide* the last note on the first clause under this head.

In an action of covenant the plaintiff declared that queen *Elizabeth* leased a messuage, &c., to the defendant for twenty-one years, and that the defendant, his executors and assigns, were thereby bound to repair and leave the premises at the end of the term in good repair, and that the queen granted the reversion to *B.*, and that *B.* granted the same to the plaintiff; and for not repairing, &c.; this a good declaration, though the plaintiff is not named assignee.

Cro. Jac. 230. Lord Ewre and Strickland, adjudged.

If in an action of covenant the plaintiff declares, whereas by indenture, bearing date, &c., *testatum existit*, that the plaintiff had demised to the defendant a messuage and garden for two years, and the defendant, by the said indenture, covenanted not to erect any building in the garden, &c., and avers *in facto*, that he did erect, &c., this is a good declaration, though he does not expressly say *quod demisit & convenit*; and it is the (b) usual course in *B. R.*, to declare in this manner.

Cro. Car. 188. Batchelor and Gaye, adjudged. Cro. Eliz. 195. Cro. Jac. 383. S. P. adjudged, & *vide*

Sid. 375., where the plaintiff declares *per quoddam scriptum per quod testatum existit*, &c. (b) And so are the precedents in *B. Cro. Eliz. 195. 2 Roll. Rep. 210, 211.*—but the usual method now is to declare, that whereas by such an indenture made between, &c., at, &c. (with a protest) such a one demised, &c.

If baron and feme being seised of an house, to them and the heirs of the baron, lease to *A.*, and he covenant with them and the heirs and assigns of the baron, to repair, &c., and the baron and feme convey the inheritance to *B.*; in an action upon this covenant, *B.* may shew the whole matter, and conclude *quod actio ei accrevit*†, as assignee of the baron, without shewing the death of the feme; for the estate for life being transferred with the fee, it is drowned therein.

Cro. Car. 285. Major and Talbot, adjudged. Jones, 305. S. C. adjudged; but by the report thereof, the baron was dead,

and the feme and the heir of the baron conveyed, and the action was brought as assignee of the heir, and said that it was no benefit to the lessee to have the estate for life continue, and therefore, &c.

† This conclusion is not now used, unless in cases of debt on penal statutes, &c. But in such actions of covenant, the usual conclusion, after signing the breach, is, And so the plaintiff says that the defendant (although requested, &c.) hath not kept with the plaintiff, the covenant made between such an one and such an one, but hath therein failed and made default, to the plaintiff's damage of so much; wherefore the plaintiff saith he is injured, and hath sustained damage, &c.

If in an action of covenant the plaintiff declares upon an indenture, in which the defendant had covenanted that he was seised in fee, &c., and would free the premises from all incumbrances, and that the plaintiff should quietly enjoy, and for breach assigns an entry and eviction by a stranger, & *sic conventionem suam* (in the singular number) *fregit*, this is well enough; (c) for *conventio est*

2 Mod. 311. After and Maseen, adjudged. (c) *Quod tenet, &c. & de conventionem*

fratris, all one. Hard. 178. — *nomen collectivum*, and if twenty breaches are assigned, the count is *de placito quod teneat ei conventionem*.

If a breach of covenant is sufficiently alleged, the plaintiff need not conclude *& sic non tenuit conventionem in hoc*, &c., for that is but repetition. Cro. Jac. 298. adjudged. 2 Mod. 229. S. P. adjudged, though it is the usual way.

Cro. Jac. 445. Sheers and Briton, adjudged. If in an action of covenant the plaintiff declares upon a lease in *London*, of a messuage in *D.*, in *com. S.*, and that the lessee covenanted to repair, &c., and assigns for a breach, that *apud London* he permitted the houses to decay, &c. this is naught, because the breach is in a matter local, and not transitory.

3 Lev. 170. Procter and Burdet, adjudged. 3 Mod. 69. S. C. Cro. Jac. 486. *contr.* If in an action of covenant the plaintiff declares upon a covenant, to find the plaintiff with meat, drink, apparel, and other necessities, and assigns the breach as general as the covenant, *viz.* that he did not find him with meat, drink, apparel, and other necessities; this is good, without shewing in particular what other things are necessary, and the *alia necessaria* shall be intended small things, as trimming, washing, &c., which would be too long to insert, and the breach being assigned in the words of the covenant, it is sufficient.

Lev. 94. French and Pierce, adjudged. (c) *Vide supra* 8 & 9 W. 3. and Saik. 137. pl. 1. * So, assigning that he had received of divers persons divers sums of money, in the whole amounting to a large sum, to wit, the sum of 100*l.*, and converted the same to his own use, contrary to the condition, would be good. So, in debt upon an obligation conditioned to satisfy for all goods that an apprentice shall waste, in his replication, the plaintiff assigned for breach, that he had wasted *diversa bona ad valentiam* 100*l.* and adjudged that it was good, without shewing in particular, what the goods were; for (a) the penalty of the obligation is to be recovered upon any breach, but said that it would be otherwise in covenant, where there is to be a recompence for the damages*.

Yelv. 226. Brownl. 117. 2 Bull. 19. S. C. & vide Cro. Jac. 259. + *Quia*, also, if he should not have alleged he was obliged to pay the legacy, or paid it to avoid a suit? If in debt upon an obligation conditioned to save the plaintiff harmless from all charges and troubles, by reason of the last will of *A.*, or any thing therein mentioned, touching one *B.*, or any legacy to her given, &c., the defendant pleads *non damnificatus*, and the plaintiff replies that he paid 60*l.* to *B.*, for a legacy, &c., this is no good replication; for he ought to shew that a legacy of 60*l.* was given her by the will; for though the will is recited in the date, against which recital the defendant cannot say he made no such will, yet the legacy given to *B.*, is not recited, but in general; against which the defendant may take a traverse +.

Jones, 218. Symens and Smith, Cro. Car. 176. S. C. & vide Hard. 13. (b) *Eut non permitt* alone is too general. 8 Co. 89. b. 91. b. & vide And. 137. 2 Vent. 278. If *A.* covenants to permit *B.*, his heirs and assigns, to take and enjoy the rents, issues and profits of certain lands, and in an action of covenant the plaintiff assigns for breach, that *A.* took the profits, & (b) *non permitt* *B.* to enjoy, &c., this breach is well assigned, for the taking of the profits by *A.* is a special disturbance.

Mod 223. Ectaw n & al. and Cook, If *A.* grants a rent to *B.* and his heirs, for the life of *C.*, to the use of *C.*, and covenants with *B.* to pay the rent *ad opus & usum* of *C.*, and in an action upon this covenant, *B.* assigns the breach, in

not paying the rent to him *ad opus & usum* of C., this breach is well assigned in the words of the covenant, though a (a) negative pregnant.

2 Mod. 138.
S. C. adjudged; and
said, that if
it was paid to C., which is a performance in substance, the defendant ought to have pleaded it. (2) For this *vide* 2 Leon. 197.

If in an action of covenant the plaintiff declares upon a charter-party, by which the plaintiff, being master of a ship, was to pay two parts of the port-charges, and the factor of the defendant the other part, and the plaintiff shews that he sailed from L. to C., and there paid all the port-charges, *viz.* two parts for himself, and the other part for the defendant, and that the defendant had not repaid him; this breach is well assigned; for when the plaintiff says he paid the third part, it shall not be intended the defendant did, but that the plaintiff was necessitated to pay it, or otherwise his ship would have been stayed in the port.

2 Jones, 186.
Bellamy and
Rusell, ad-
judged.

In covenant, which was that the defendant should make out a good title in law and equity, before such a time, to the satisfaction of the plaintiff, his heirs or assigns, or to his or their counsel learned in the law, the breach was assigned in the very words of the covenant; and it was objected, that the covenant, being in the (b) disjunctive, *viz.* *to satisfy the plaintiff or his counsel*, he had his election, and therefore the plaintiff ought to have given notice who his counsel was, before which time the defendant could not satisfy him; but it was resolved that the breach, being in the very words of the covenant, was sufficient; and if the truth was, that the defendant did not know who the plaintiff's counsel was, he should have set it forth in pleading.

Carth. 124.
Rawl ne and
Vincent,
adjudged.
(b) *Vide*
Cro. Eliz.
348.
5 Mod 133.
Salk. 139.
Pl. 4.

If an assignee of a term has a covenant from the assignor, that he shall quietly enjoy, free and clear from all taxes, and all arrears of rent, &c., though there be rent arrear, yet he cannot assign this as a breach of the covenant; for the rent being arrear, is no damage to him, unless he be sued or charged therewith; and if paid at any time before he is damnified, it is sufficient for him.

Salk. 196.
pl. 2.
Griffith and
Harrison,
adjudged.

So, if a counter-bond or covenant be given to save harmless from a penal bond, after the condition of the obligation be broken, or to save harmless from a single bill, without a penalty, the counter-bond cannot be sued without a special damnification.

Salk. 196.
pl. 2. *per*
Cur.

But where the counter-bond or covenant is given to save harmless from a penal bond, before the condition broken, there, if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter-bond forfeited.

Salk. 197.
pl. 3. *per*
Cur.

The defendant covenanted to pay so much *per* chaldron for all coals laden either at *Newcastle*, or upon the river *Tyne*, and brought to *London*; and the breach assigned was, that the coals were laden on such a ship *infra portum de Tinnmouth*, *viz.* at *North Shields*, and brought from thence to *London*; and on demurrer, the court inclined that the breach was not well assigned, for that they could not take notice judicially, that *Tinnmouth* is upon the river *Tyne*,

5 Mod. 352.
Toddard
and Mid-
dleton.

but they gave the plaintiff leave to discontinue upon payment of costs.

Loggin v.
Comitem
Orrey,
1 Ld. Raym.
133.
Dougk. 667.
Cowp. 665.
727.

[In an action on a covenant to pay money on one of two contingencies, which shall first happen, if the plaintiff shew that one has happened, he need not aver it to be the first.

In a declaration in this species of action it is not merely unnecessary, but improper, to state the whole of the deed. So much only as will entitle the plaintiff to his action must be shewn; and that part need not be literally recited, but may be set forth according to its substance and effect; though it is usual and adviseable to deviate as little as may be from the expressions in the instrument.]

(K) Where the Performance shall be said to be well set forth and pleaded.

Co. Lit.
303. b.
Kelw. 95.
Leon. 136.

IF a man is bound to perform all the (a) covenants in an indenture, if they are all in the affirmative, he may plead performance thereof generally.

Palm. 70. Lev. 303. S. P. (a) But in debt upon an obligation, conditioned to do several things in the condition mentioned, the defendant cannot plead performance generally, but ought to plead to every thing particularly by itself. Lev. 303. & vide Sid. 215. Kelw. 95. b. — *Quod conditio nunquam infracta fuit*, is naught. 2 Vent. 156. [See too Sayre v. Minns, Cowp. 578.]

Co. Lit.
303. b.
Moor, 856.
Cro. Eliz.

But to (b) such as are in the (c) negative, he (d) must plead specially, (for a negative cannot be performed,) and to the rest generally.

691. Palm. 70. (b) But if the negative covenants are all void and against law, and the affirmative good and lawful, he may plead performance generally, and the court shall take notice that the negative covenants are void and against law. Moor, 850. Godb. 212. Hob. 12, 13. (c) Unless the negative covenant is only in affirmance of the affirmative covenant precedent. Sid. 87. (d) But it is only matter of form, and helped upon a general demurrer. Cro. Eliz. 232. Leon. 311. & vide All. 72. Style, 63.

Co. Lit.
363. b.
Sav. 120.

If any of them are in the disjunctive, (e) he must shew which part he hath performed.

S. P. *arguendo*. Cro. Eliz. 560. Palm. 70. S. P., and if performance generally is pleaded, it is naught upon a general demurrer; for that the court cannot tell which part he hath performed. Cro. Eliz. 232. Leon. 311. (e) But if the condition of an obligation be to perform the award of J. S., and he award the obligor to pay 100 l., or to procure a stranger to be bound in 200 l. &c., the defendant may plead performance generally, because one part is void; and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part. Sav. 120.

Co. Lit.
303. b.
(f) As to
levy a fine.

If any of them are to be done (f) of record, the performance thereof must be shewn specially, and it cannot be involved in the general pleading.

Cro. Jac. 560. 2 Roll. Rep. 159. Palm. 70. S. P. adjudged; and the reason given, because the record shall be tried by itself, and its credit shall not be examined by a jury; and perhaps the plaintiff will reply, that all the lands are not comprised in the fine, or other matter upon which the fine shall be examined.

2 Co. 4. a.
Manfer's
case, ad-
judged. Cro.

If in debt upon an obligation conditioned that the plaintiff shall enjoy certain lands (g) discharged, or otherwise saved harmless (b) from all incumbrances, the defendant pleads that the

plaintiff

plaintiff hath enjoyed the lands discharged, and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative (i) it ought to have been shewn (k) how; but if he had pleaded in the negative *non fuit damnificatus*, it had been otherwise.

Jac. 363.
Winch. 9.
March, 121.
Like point
adjudged.
(g) If the
condition be

to acquit, discharge, and save harmless from such a bond *non damnificatus*. Leon. 71. — But in an action upon a bond, conditioned to acquit, discharge, and save harmless, a parish from a bastard child, the defendant pleaded *non damnifica*, and the plaintiff demurred; and because it did not appear upon the whole record, that the parish was damnified, it was adjudged for the defendant. 3 Mod. 252. *vide* March, 121. — But if in debt upon a bond, conditioned to save harmless *J. S.* and the mortgaged premises, and to pay the interest for the principal sum, the defendant pleads *J. S. non fuit damnificatus*; for that the defendant paid the principal money, and all interest due at such a day; this is no good plea, because *non damnificatus* goes to the person, and not to the premises. 2 Mod. 305. adjudged. — If the condition be to save harmless the obligee against another, *non damnificatus* is a good plea. Kelw. 80. — But if to discharge the obligee, it ought to be shewn in the affirmative how. Kelw. 80. *per* Frowick. (b) So, if the condition be to save harmless from all bonds entered into for the obligor, *exoneravit & indemnem conservavit* is no good plea, without shewing how. Cro. Eliz. 216. But that he need not shew from what bond he saved him harmless; and *per* Cro. Eliz. 433. *per* Gaudy, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things; for in the last case it is sufficient to plead generally. (i) Cro. Jac. 165. S. P. adjudged. All. 72. S. P. adjudged, & *vide* Cro. Eliz. 477. Cro. Jac. 503. (k) But a man may plead *quod exoneravit*, &c. from an arrest, without shewing how, for that it may be done by composition, &c. without deed. Cro. Eliz. 914. adjudged. — So, in debt upon a bond, conditioned to perform the award of *J. S.*, if it is awarded that a suit in Chancery, by the defendant against the plaintiff, shall cease, and the plaintiff shall stand acquitted *de quolibet materia in eadem contenta*; the defendant may plead *quod fecit inde quietus*, without shewing how, or that he *in facto* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted. Cro. Jac. 339. Roll. Rep. 8. 2 Bulst. 93, 94. — Otherwise, if the award had been, that he should discharge and save him harmless from a certain obligation. Leon. 71.

In debt upon an obligation, conditioned that the defendant shall repair and do other things, and also pay his rent every day of payment, he cannot plead performance generally, but must plead specially. Kelw. 95. b.

But where the condition refers to such a generalty, that by indentment it is past the remembrance of man; as if the under-sheriff is bound to discharge his master from all accounts and returns of writs within the county, he may plead performance of the condition generally. Kelw. 95. b.

In debt upon a bond, conditioned that the defendant shall enfeoff the plaintiff of all his lands, the defendant must plead performance specially. Kelw. 95. b. S. P. *per* Cur. cont.

Sid. 215. Latch. 16.

But if the condition be that (a) a stranger shall enfeoff the obligee, a general performance may be pleaded. Kelw. 95.

(a) But by the case of

Lee and Luttrell, Cro. Jac. 559. 2 Roll. Rep. 159. Palm. 70., it is otherwise.

If the condition of an obligation be to make to the obligee a lawful estate in certain lands, it is safe to plead that he hath (b) enfeoffed him thereof, which is a lawful estate, though in strictness it is not necessary, because it appears to be a lawful estate. Kelw. 95. b.

(b) If the condition be to convey an estate, in pleading, it must be

shewn by what manner of conveyance it was done. Leon. 72. 2 Leon. 39. Godb. 360. 2 Mod. 240. So, if the condition be to shew a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may judge whether sufficient or not. 9 Co. 25. a. Hob. 107. 2 Mod. 240.

But if the condition be to build a sufficient house, the defendant must say that he hath built such an house, which is sufficient. Kelw. 95. b.

In

Kelw. 95. b.
(a) But in
Cro. Eliz.
869. per
Cur., he
may plead
that he hath delivered all, &c.; and the contrary, in some particular, ought to be shewn on the other
side.

In debt upon an obligation conditioned to deliver all evidences concerning such lands, the defendant (a) must plead that he hath delivered such and such charters, which are all the charters concerning the land.

Cro. Eliz.
749. &
vide Sid.
215. 334.
Cro. Eliz.
916. Like
point.

In debt upon an obligation, conditioned that the defendant at all times, upon request, should deliver to the plaintiff all the fat and tallow of all beasts which should be killed or dressed by the defendant, his servants, or assigns, before such a day; the defendant may plead, that upon every request to him made, he did deliver to the plaintiff all the fat and tallow of all beasts, &c. without shewing how many beasts were killed or dressed, or what quantity of fat he delivered; for when matters tend to infinity and multiplicity, whereby the rolls would be incumbered with length, the law allows of such general pleading.

Cro. Eliz.
281. Fox
and Lee,
adjudged.
(b) But such
general
pleading is
not good, where a certain day of payment is not mentioned in the condition. 2 Bulst. 267.—In debt
upon an obligation conditioned to deliver such briefs such a day, the defendant pleads that he delivered
them *secundum formam conditionis præd.*, and the court inclined to think it bad; but the matter was
adjourned. Lev. 145.

In debt upon an obligation, conditioned for the payment of 60*l.* viz. 30*l.* at one day, and 30*l.* at another day, the defendant may plead payment of the 60*l.* *secundum formam & effectum conditionis præd.*; for *reddendo singula singulis*, it is as if he had pleaded the several payments at the several (b) days.

Cro. Eliz.
870. Waller
and Croot,
adjudged.

If in debt upon an obligation, conditioned that if the obligee shall enjoy such lands till the full age of *J. S.* and if *J. S.* within one month after his full age, makes an assurance thereof to the obligee, then, &c. the defendant pleads that *J. S.* is not yet of full age; this plea is not good, without shewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Cro. Jac.
359.
2 Bulst. 267.
S. C. Halsey
and Carpenter,
Bulst.
43. S. P.
(c) If the

If in debt upon an obligation, conditioned to pay 30*l.* to *A. B.* and *C. tam cito* as they shall come to the age of twenty-one years, the defendant pleads that he paid those sums *tam cito* as they came of age, this is no good plea; for the (c) time, place, and manner of performance, ought to be shewn in certain; so that a certain issue might be taken upon it.

Condition be to surrender a copyhold, the defendant must not plead generally, that he hath surrendered it, but must shew when the court was held, &c. Winch. 11. adjudged.—If the condition be, that the obligee shall enjoy an office according to letters patent, the defendant must not plead *in hæc verba*, but shew the effect of the letters patent, and the enjoyment accordingly. Hob. 295.

2 Med. 33.
Duck and
Vincent,
adjudged.

If in debt upon an obligation, conditioned to perform covenants, one of which was for the payment of money upon the making of an assurance, the defendant pleads that he paid the money such a day, but saith not when the assurance was made, this is naught; for that it ought to appear that the money was immediately paid, pursuant to the covenant.

2 Sand. 420.
Watson and
Waterhouse.

In an action of covenant, the plaintiff declared that his father was seised in fee of a messuage, and leased to the defendant for twenty-

twenty-one years, and that the defendant covenanted to repair, support, and amend the same, during the term, and that his father died, &c. and that the messuage was *totaliter dirut. & ruinof.*, and the defendant pleaded, that before the house was ruinous, &c. he assigned to J. S. and that after the house was burnt, *quodque in convenienti tempore post destructionem domus præd.,* and before the action brought, *messuag. præd. cum pertinentiis sufficienter re-edificat.,* &c. fuit, & adhuc in bonâ reparatione sufficienter existit. Adjudged, upon a special demurrer, that this plea was naught; because it was not shewn by whom it was rebuilt; though it was objected, that (a) it was not material by whom it was rebuilt; and if by a stranger, it could not be built again by the defendant; and he having assigned all his interest before, it lay not in his notice by whom it was built; but that it could not be presumed to be built by the plaintiff; for that he could not intermeddle with the possession during the term; but by the report, it being alleged that the plaintiff had rebuilt it at his own charge, Hale refused to hear the reasons, and *quasi* in a passion, without considering the matter in law, gave judgment for the plaintiff.

(a) 1 Vent.
38. S. P.
dubietur.

In debt on a bond, for performance of covenants in an indenture, the defendant cannot plead performance generally, without setting forth the indenture.

Carth. 4, 5.
Seems to be
admitted,
that he can-

not plead performance, without shewing it. All. 72. 1 Vent. 37. Sid. 50. Mod. 266. — Where he swears he never had part thereof, or hath lost it. Sand. 8, 9. Cro. Jac. 429.

In covenant by an assignee of a lease, against the assignor, who covenanted to indemnify the assignee from all rent arrear, &c. the breach assigned was in the non-payment of the rent; to which the defendant pleaded as to part, payment to the lessor; and as to the other part, that he left money with the plaintiff *ea intentione quod solveret* to the lessor; though it was objected, no issue could be taken on his intention, yet the court (*Holt, C. J. contra*) inclined the plea was good, but held clearly that if it had been *reliquit ad solvendum*, it had been good, and that *non reliquit modo & forma*, had been a good traverse.

Skin. 397.
Pl. 31.
Griffin and
Harrison,
4 Mod. 249.
Salk. 196.
Pl. 2. S. C.
asjudged.

[On a covenant "to permit the plaintiff in the last year of the term to sow clover among the barley and oats sown by the defendant," the breach assigned was, "that the defendant sowed barley and oats *without giving notice* to the plaintiff;" to which the defendant pleaded, "that he did not prevent the plaintiff from sowing as much clover as he thought fit;" and adjudged a good plea.]

Hughes v.
Richman,
Cowp. 125.

(L) What may be pleaded in Bar to the Action.

IN an action of covenant for non-payment of rent, the defendant cannot plead *levied by distress*, for that is a confession it was not paid at the day; for it could not be distrained for till after the day; but it was agreed, that the covenant alters not the nature of the rent; but that nothing behind, or payment at the day, is a good plea.

2 Brownl.
237. Hare
and Savil,
adjudged.

In

2 Lev. 7.
Watton and
Wedding-
ton.

In debt upon an obligation, conditioned that if a ship that was going such a voyage should return, (the perils of the sea excepted,) the defendant should pay so much; but if the ship should be lost, nothing, &c. the defendant pleaded, that the ship did go on her voyage, and, in her return, such a day *amissa fuit*; and it was adjudged a good plea, though it was not said *quod amissa fuit periculo maris*; and she might be lost by the defendant's own default; for the plea is in the last part of the words of the condition, which makes the bond void, as well as if the ship had returned, &c.

(a) Lev. 152.
Johnson and
Carr.

It has been adjudged, that to avoid circuity of action where there are reciprocal covenants in the same deed, one covenant may be pleaded in bar to another; as (a) in an indenture of a lease for years, where the covenant was that the lessee might subduct for charges, and he pleaded this covenant in bar to an action of debt for the rent, it was holden good.

2 Mod. 309.
Et vide
5 Co. 78.
7 Co. Ugh-
tred's case.
Cro. Jac.
645. 3 Keb. 352. 3 Lev. 41, 42. Show. 391. Comb. 265.

But in 2 Mod. 309. it is said, that reciprocal covenants cannot be pleaded one in bar of another, and that in the assigning of a breach of covenant it is not necessary to aver performance on the plaintiff's side.

Sand. 319.
Pordage
and Cole,
Lev. 274.
Sid. 423.
Raym. 183.
2 Keb. 542.
S. C.

As, where a writing was drawn in these words, *It is agreed that A. shall pay to B. 170l. for his land and house, &c. the money to be paid before Midsummer. In witness, &c.* It was sealed by both parties. The money not being paid at the day, [B. brings an action of debt upon the bill, but makes no averment in his declaration that he had conveyed the land, or tendered any conveyance of it; it was holden to be well brought notwithstanding, for both parties sealed the deed; and if the plaintiff had not conveyed the land to the defendant, he might have had an action against the plaintiff on the agreement contained in the deed, and so each party had mutual remedy against the other: but it might have been otherwise, if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the case stated.]

Hil. 29 and
30 Car. 2.
Dyelly and
Tuer, ad-
judged.

So, in an action of covenant the case was, *A. covenants with B. to make him a good lease of his land and his sheep, and that B. should have fire-wood upon his land, and B. covenants to pay one half year's rent at Michaelmas following; in an action of covenant for this rent, B. pleads, that A. refused to lease the land before Michaelmas; & per totam curiam, The plaintiff must have judgment, for B. has his remedy upon the covenant of A.*

Howlett v.
Strickland,
Comp. 56.
Turner v.
Goodwin,
10 Mod.
190. 2 Bar-
nard. 308.
Jenck v.

[Unliquidated damages arising from a reciprocal breach of covenant, cannot be pleaded by way of *set-off*.

But where the covenants are dependent, no action will lie by the one party against the other, unless he have performed, or offered to perform his covenant; the performance of the one being a condition precedent to the performance of the other: therefore, where

where two acts are to be done at the same time, neither party can maintain an action without shewing a performance, or offer to perform on his part.]

id. 689. *Goodisson v. Nunn*, 4 Term Rep. 761. And where mutual covenants go to the whole of the consideration on each side, they are mutually precedent conditions. *Boone v. Eyre*, cited in 1 H. Bl. 273. *Duke of St. Alban's v. Shore*, *id.* 270.

Barkley,
Doug. 684.
Kingston v.
Preston,

But if there be a covenant, that an obligee shall not put the bond in suit at any time, such covenant is pleadable in bar as a release, because in effect it is so; but where the covenant is that it shall not be put in suit for a certain time limited in the deed, this is only a covenant; and for breach thereof an action is maintainable, but is not pleadable in bar to the bond.

Carth. 64.
per Cur.

[*Accord with satisfaction by deed*, is a good plea in discharge of covenant, as well before breach as after; because it is an action merely personal; in which only damages shall be recovered, and it enures as a release of the covenant.

Robards v.
Stoker,
Palm. 110.
In Russell
v. Russell,

3 Lev. 189., it is said to be no plea, unless executed on both parts.

So, *accord with satisfaction by parol*, made after the breach, is a good plea, the defendant alleging that the terms of the agreement were duly complied with on his part.]

Co. Entr.
117. How-
ever, a va-
riation, by

parol, of the terms of an agreement under seal, can avail neither plaintiff nor defendant at law, though such new dispensation may be a ground for resorting to a court of equity. *Littler v. Holland*, 3 Term Rep. 590.

Courts, and their Jurisdiction in general.

FOR the better understanding of the nature and jurisdiction of courts, it may be necessary to premise some considerations concerning them in general, before each particular court comes to be treated of; and this I shall do by considering,

(A) The Nature and Original of our Courts, and by what Authority constituted.

(B) Of the Judges and Persons exercising a Jurisdiction.

(C) What determines their Jurisdiction and Authority.

(D) Of

(D) Of their Division, and the Subordination of one Court to another : And herein,

1. In general, of the several Kinds of Courts which exercise a Jurisdiction.
2. Of such as are of Record or not.
3. How inferior Courts must claim their Jurisdiction ; and herein of Pleading to the Jurisdiction, and demanding Conufance.
4. Where it must appear that inferior Courts have a Jurisdiction.

(E) What is incidental to all Courts in general.

(A) Of the Nature and Original of our Courts, and by what Authority constituted.

Lamb.
Arch. 57.
239. 245.
Mirror, c. 5.
§ 1.

* Or *witten-agemet*, or *witten-agemet*. See Squire on the *Anglo-Saxon Government*, 165.

IN the *Saxon* times, the *Wittingham Mote* * was the chief court of the kingdom, where all matters both civil and criminal, and also relating to the revenue, were debated and determined ; but for civil and criminal matters, it was only a court in the first instance, for facts arising within the county where it sat ; but by way of appeal from the injustice of other courts, it heard and determined causes from all other counties.

Lamb.
Arch. 239.

To this court were summoned the earls of each county, and the lords of each leet, and likewise representatives of towns, who were chosen by the burgesses of the town, who appeared on the king's summons, which issued once a year at least ; and here new laws were enacted, or old ones repealed, after the manner of our parliaments.

Maddox,
4. 7.

But *William* the Conqueror caused the states to recognize him, and fearing that these parliaments, consisting of *Englishmen*, might prove dangerous, he established a constant court in his own hall, made up of the officers of his palace, and they transacted the business both criminal and civil, and likewise the matters of the revenue ; and as they sat in the hall, they were a court criminal, and when up the stairs, a court of revenue ; the civil pleas they heard in either court.

Maddox,
c. 9.

The court consisted, 1. Of the *Jusficiar*, who presided, and was called *Capitalis Jusficiarivs totius Angliæ*, and chiefly determined all pleas civil and criminal, and was also the chief officer of state. 2. The chancellor who formed all patents, and put the seal to them, and had the custody thereof, both for writs and patents.

patents. 3. The treasurer, before whom all accounts were chiefly audited; and he it was that presided in matters relating to the revenue. 4. The constable and marshal, to whom all matters of honour and of war and peace were referred, to determine according to the law of nations and of arms. 5. The seneschal or steward, and marshal, who determined the quarrels and disputes between the king's menial servants; the marshal was also to keep the prisoners, and take care that no indecency was committed in the king's house. 6. The chamberlain, who was to count the king's money as it came in, and issued out of the treasury.

This was the sovereign court of the kingdom, where justice was administered, and where all matters of the highest moment were transacted by the king himself and these officers; yet, in some cases, of great importance, as upon the levying of a new war, or raising an escuage, most of the great persons that held *in capite* were called, and then it was termed the *commune concilium regni*, or the parliament; to which afterwards the representatives of boroughs that held *in capite* were called.

Towards the *Norman* period, the power of the *justiciar* became formidable, and in the barons' war was turned against the king; the king also found, that the barons who held large districts, were likely to grow more and more troublesome to the crown; for though in the Conqueror's time, and for some reigns after the conquest, they were kept in very good subjection, the *Norman* and *English* barons being a balance for each other; yet time wearing away the distinction, and the *Normans* growing up *English*, they became fond of those liberties and privileges that the *English* had enjoyed in the *Saxon* times; hence it was necessary to introduce a new policy, and hence the original of our courts, as we have them at this day in *Westminster-hall*.

To give countenance to this new erection and division of courts, (which was completed by *E. 1.*) as also that it might still be seen, that all justice flowed from the king, the king himself (*a*) sat in person in the court of (*b*) *King's Bench*; and hence the power of this court, which it still retains, of exercising a superintendency over other jurisdictions; but though the king was sometimes present, yet the chief justice gave the rule, that the king might not decide in his own cause.

Ed. 4. * and Rich. 3. † sat there in person. *How. Med. Hist. Ang.* * 131. † 136. supposed to have always the king himself in person sitting in it. Dyer, 187. pl. 6. Maddox, 543. Crompton of Courts, 78.—And hence every process in the King's Bench is made returnable before the king himself. 28 Aff. pl. 52.

But however this regulation might have been begun, or however it might have been formerly, as to the king's sitting and determining in causes, it seems now agreed, that our kings having delegated their whole judicial power to the judges of their several courts, those judges, by the long, constant, and uninterrupted usage of many ages, have now gained a known and stated jurisdiction, regulated by certain and established rules, which our kings themselves cannot make any alteration in without an act of parliament.

But

Maddox,
c. 8.

Maddox,
c. 8.

Maddox,
c. 19.
fol. 21.
and 135.
Roll. Abr.
94., & wide
2 Inst. 24,
25.
(a) Speed.
521. Roll.
Abr. 535.
(b) Is still

2 Inst. 73.
2 Hawk.
P. C. 2.

S. P. C.

54, 55.

2 Hawk.

P. C. 2.

(a) There-
fore if an
ordinary

But as the king is the fountain of justice, and the supreme magistrate of the kingdom, intrusted with the whole executive power of the law, no court whatsoever can claim (a) any jurisdiction, unless it some way or other derive it from the crown.

certify, or try bastardy, without a writ from the king's temporal courts, it is void; for the spiritual jurisdiction within these kingdoms is derived from the king, and must be exercised in the manner the king has appointed. Roll. Abr. 361.

6 H. 7. 4. b.

5. a.

4 Inst. 125.

127.

6 Co. 11. b.

12. a.

But it is clearly agreed, that the king cannot give any addition of jurisdiction to an ancient court, but that all such courts must be holden in such manner, and proceed by such rules, and in such cases only as their known usage has limited and prescribed; and hence it followeth, that the court of *King's Bench* cannot be authorized to determine a mere real action between subject and subject; so neither can the court of *Common Pleas*, to inquire of treason or felony.

4 Inst. 87.

Sid. 338.

(b) That the
king cannot
grant a mere
spiritual ju-

And it is said, that the king is so far restrained by the ancient forms, in all cases of this nature, that his grant of a (b) judicial office for life, which has been accustomed to be granted only at will, is void.

risdition, as to ordain, institute, &c., to a lay person, nor can he exercise them himself; but must administer those laws by bishops, as he does the common law by judges. *Vide Cro. Eliz.* 259. 314.

4 Aff. 5.

Bro. Com-

mission, 3.

15, 16.

12 Co. 30.

31. 2 Inst.

478. A commission under the great seal to take *J. N.*, a notorious robber, and to seize his lands and goods, illegal. 2 Inst. 54.

Also, commissions to seize the goods, and imprison the bodies of all persons who shall be notoriously suspected of felonies and trespasses, without any indictment or other legal process against them, are illegal and void.

(c) 4 Inst.

163.

18 E. 3. r. 4.

(d) 2 Inst.

478.

And it is said, that the king cannot grant any new commission whatsoever that is not warranted by ancient precedents, however necessary it may seem, and conducive to the publick good; and, therefore, (c) commissions to assay weights and measures, being of a new invention, were condemned by parliament; and it is (d) said, that the king could not authorize persons to take care of rivers, and the fishery therein, according to the method prescribed by the statute of *Westm. 2. cap. 47.* before the making of that statute.

(B) Of the Judges, and Persons exercising a Jurisdiction.

4 Inst. 70,

71. 2 Inst.

103. 8 H. 4.

13. b.

S. P. C. 54.

Dalt. c. 1.

THE king himself, though he be intrusted with the whole executive power of the law, cannot sit in judgment in any court, but his justice, and the laws, must be administered according to the power committed to and distributed among his several courts of justice.

All judges must derive their authority from the crown, by some commission warranted by law: the judges of *Westminster* are (all except the Chief Justice of the *King's Bench* (a), who is created by writ) appointed by patent, and formerly held their places only during the king's pleasure; (b) but now for the greater security of the liberty of the subject, by the 12 & 13 W. 3. c. 2. their commissions are to be *quamdiu se bene gesserint*; but upon the address of both houses of parliament, it may be lawful to remove them.

to *capitalis jussiciarius*. *Ibid.* (b) The chief and other barons of the Exchequer were created in Sir E. Coke's time, *quamdiu se bene gesserint*. *Id.* 117.]

4 Inst. 74, 75. [(a) He was anciently made by patent also: the alteration took place under E. 1., when his title was changed from *junius*

And by the 27 H. 8. cap. 24. it is enacted, "That no person or persons of what estate, degree, or condition soever they be, shall have any power or authority to make any justices of *eyre*, justices of assize, justices of peace, or justices of gaol-delivery, but that all such officers and ministers shall be made by letters patent under the king's great seal, in the name, and by the authority of the king's highness, in all shires, counties palatine, *Wales*, &c., or any other his dominions, &c., any grants, usages, allowance, or act of parliament to the contrary notwithstanding."

As all judges must derive their authority from the crown, by some commission warranted by law, they must also exercise it in a legal manner, and hold their courts in their proper persons, for they cannot act by (c) deputy, nor any way transfer their power to another, as the judges of ecclesiastical courts may.

Bro Judges, 11. Latch. 7. Cro. Car. 259. Cro. Eliz. 314. (c) That a

recorder of a town, unless the custom allows, cannot make a deputy; for this is a judicial office. *Vide* Raym. 88. Lev. 125. Keb. 538. 639. 659., and the title *Office and Officers*.

But it seems, that, regularly, where there are divers judges of a court of record, the act of any one of them is effectual, especially if their commission do not expressly require more.

2 Hawk. P. C. 3. and *vide* the authorities there cited.

The judges are bound by oath to determine according to the known laws and ancient customs of the realm; and their rule herein must be the judicial decisions and resolutions of great numbers of learned, wise and upright judges, upon variety of particular facts and cases, and not their own arbitrary will and pleasure, or that of their prince.

Vide the statutes 18 E. 3. c. 1. 20 E. 3. c. 1, 2. 4 Inst. 88. 109. Dalt. 13. S. P. C. 173. Co. 24. 12 E. 4. 13. 21 E. 4. 67. a. Salk. 357. (d) But

But though they are to judge according to the settled and established rules and ancient customs of the nation, approved for many successions of ages, yet are they freed from all prosecutions for any thing done by them in court, which appears to have been an (d) error of their judgment.

where for wilful corruption they have been complained of in the star-chamber, *vide* Vaugh. 139. And may still be called to an account in parliament. Hawk. P. C. c. 72. § 6. 12 Co. 24.

Nor is a judge, constituted by the king, and thereby stamp with his approbation, and to whom alone it belongs to judge of his fitness, to be reflected on, censured, defamed, or vilified with respect to his ability, parts, fitness for his place, &c.; for, if this were allowed, it would be impossible to keep in the people that

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Vaugh. 138, 139.

veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigour and success; and hence all scandalous reflections on the judges of *Westminster-Hall*, are within the statute of *scandalum magnatum*.

8 H. 6. 19. No person can be a judge in his (a) own cause, but the chief justice of the Common Pleas may bring an action in that court, but then the entry must be special, viz. *placita coram Johanne Blencowe milite, &c.*

b. 2 Roll. Abr. 92. Salk 398. (a) The Ma or of Hereford was laid by the heels, for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he by the charter was sole judge of the court. Salk. 396.

1 H. 7 26. a. 3 Inst. 29. Fortesc. Rep. 389. See 12 G. 2. c. 27. [whereby judges are enabled to act as judges of oyer and terminer or gaol-delivery in their own counties, which they were incapable of doing by the 8 R. 2. c. 2.]

No judge of any court of record is compellable to deliver his opinion before-hand, in relation to any question which may afterwards come judicially before him.

By the 33 H. 8. cap. 24. it is enacted, "That no justice, nor other man learned in the laws of this realm, shall use nor exercise the office of justice of assise, within any county where the said justice was born, or doth inhabit, on pain of 100*l.* &c., provided the said act shall not extend to any person who shall be clerk of assizes, and associate to any justice of assise; nor to any mayor, sheriff, recorder, steward, bailiff, suitor, or other officer, being born, or dwelling within any city, borough, or town within this realm of *England*, &c., nor to justices of either bench, for taking, hearing, or determining assises in the one bench or the other; nor to the justices, justice clerks, or clerk of assises in the duchy and county palatine of *Lancaster*."

(C) What determines their Jurisdiction and Authority.

And. 44. Dyer, 165. 7 Co. 30. a. Cro. Car. 1, 2. N. Bendl. 79.

IT has been determined, that at common law the patents of the judges, (b) sheriffs, escheators, commissioners of oyer and terminer, gaol-delivery, and of the peace, and of the attorney-general, are determined by the death of the king, in whose name they are made. But see *infra*.

(b) But the office of a sheriff, in such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30. b. — Nor the authority of a coroner or verderor. Dalt. 15. Dyer, 165. 2 Inst. 175. 1 Lev. 120. — Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 Hawk. P. C. 3.

But to prevent the disorders and other inconveniencies which may happen upon the death of a king, from the want of persons armed with competent authority to execute the laws before the successor can have time to appoint others; by the 7 & 8 W. & M. cap. 27. it is enacted, "That no commission either civil or military shall cease, determine, or be void, by reason of the death and demise of his said late majesty, or of any of his heirs or successors, kings or queens of this realm; but that every such commission shall be, continue, and remain in full force and virtue for the space of

“ of six months next after any such death or demise, unless in the
 “ mean time superseded, determined, or made void by the next
 “ and immediate successor, to whom the imperial crown of this
 “ realm, according to the act of settlement in the said statute
 “ before mentioned, is limited and appointed to go, remain, or
 “ descend.”

And by the 1 Ann. cap. 8. it is further enacted, “ That no pa-
 “ tent or grant of any office or employment either civil or mili-
 “ tary, hereafter to be made, shall cease, determine, or be void, by
 “ reason of the death or demise of any king or queen of this
 “ realm; but that every such patent or grant shall be, continue,
 “ and remain in full force for six months next after any such death
 “ or demise, unless in the mean time superseded, determined, or
 “ made void by the next immediate successor, to whom the crown
 “ is limited and appointed to go, remain, or descend.”

And it is further enacted by the same act, “ That no commis-
 “ sion of assize, *oyer* and *terminer*, general gaol-delivery, or of
 “ association, writ of admittance, writ of *fi non omnes*, writ of assist-
 “ ance, or commission of the peace, shall be determined by the
 “ death of any king or queen of this realm; but every such com-
 “ mission and writ shall be and continue in full force for six
 “ months next ensuing, notwithstanding such demise, unless su-
 “ perseded or determined by the next successor; and also no ori-
 “ ginal writ, writ of *nisi prius*, commission, process, or proceedings
 “ whatsoever, in, or issuing out of any court of equity, nor any
 “ process or proceedings upon any office or inquisition; nor any
 “ writ of *certiorari*, or *habeas corpus* in any matter or cause, either
 “ criminal or civil; nor any writ of attachment, or process for
 “ contempt, &c., shall be determined, abated, or discontinued by
 “ the demise of any king or queen of this realm; but every such
 “ writ, &c., shall remain in full force, to be proceeded upon as if
 “ such king or queen had lived*.”

If a judge of the Common Pleas is made a judge of the King's
 Bench, by this the inferior authority is determined; for it would
 be impertinent for him to reverse his own judgment, which other-
 wise he might do upon a writ of error.

The authority of justices in *cyre*, *oyer* and *terminer*, &c., is (a)
 determined by (b) the King's Bench sitting in the same county.

(a) Their authority, how suspended by writ of *superseatas*, which is grantable on proof that their com-
 mission was unduly obtained, *vide* Reg. 124, 125. 12 Aff. 21. 4 Inst. 163. H. P. C. 162. (b) Whe-
 ther they have notice thereof or not. 4 Inst. 73. But *qu.* 21 H. 7. 29. b. [Bro. Commission, 10.,
 saith that it is not determined, unless proclamation is made of the coming of the King's Bench. But
see 2 Hawk. P. C. c. 3. § 11.]

If a commission is made to judges of assize, and after the king
 makes other judges of assize in the same county, (c) by this the
 first commission is not determined, but they may proceed there-
 upon (d) till notice of the second; and they are not bound to take
 notice of a proclamation thereof in the county, for the law hath
 not provided that any such proclamation thereof should be made.

first is determined, and what shall be sufficient notice, *vide* Leon. 270. Godb. 105. 34 Aff. 8. Bro.
 Commission, 14. Moor, 186. pl. 333. H. P. C. 162. 4 Inst. 195. Dyer, 355. p. 36. — And yet
 the proceedings shall not be discontinued, *vide* the statutes of 11 H. 6. c. 6. and 1 E. 6. c. 7., and 2 Hawk.

* And now
 by the stat.
 1 Geo. 2.
 c. 23., the
 judges are
 to continue
 during good
 behaviour,
 notwith-
 standing the
 demise of
 the crown.
 Dyer, 159.
 Cro. Car.
 128. S. C.
 cited, and
 agreed.

Dyer, 159.
 4 Inst. 73.
 9 Co. 118.

Kelw. 116.
 (c) But
 where, by
 the issuing
 and notice
 of the se-
 cond com-
 mission, the

P. C. c. 5. § 12. (d) The old sheriff may act till the new patent is shewn him, so that he may have notice of his discharge. Cro. Eliz. 12. 430. Moor, 186 pl 353 4 Inst. 165. S. P. cont. — But justices of the peace left out of the new commission, must take notice thereof after publication of the new commission at the next sessions. Moor, 187. 4 Inst. 165. S. P.

Crom. Jur.
12c.
H.P.C. 161.
4 Inst. 165.
Dals. 21.
Dye, 205.
Leon. 270.

If the justices hold a session without adjourning it, and the commission hath no time limited for its continuance, as where it is appointed *pro hac vice* only, their authority is determined; but if the commission be granted for a certain time, or *quamdiu nobis placuerit*, as it does not necessarily require any adjournment, if the court holden by virtue of such commission break up without any adjournment, or upon a void one, as being made without the consent of the majority of the commissioners; yet it may be holden again on a new summons.

(a) Bro.
Commis-
sion, 4 22.
(b) But it
hath been
doubted,
whether the
dignity of
a baronet,
which has
been created
since that statute,
be within the equity of it. Cro. Car. 104. Lit. Rep. 81. (c) But now by the
1 Ma. c. 8. No person being sheriff, shall exercise the office of justice of the peace.

It was (a) formerly holden, that by the justice's acceptance of any new name of dignity, the commission was determined; but this is remedied by 1 E. 6. cap. 7. by which it is enacted, "That if any person, being in any of the king's commissions whatsoever, shall fortune to be made or created duke, archbishop, marquis, earl, viscount, baron, bishop, (b) knight, justice of the one bench or of the other, or serjeant at law, or (c) sheriff, yet that notwithstanding he shall remain commissioner, &c."

"By the 2 & 3 Ph. & M. cap. 18. a new commission of the peace, or gaol-delivery for the county, &c., shall not supersede a former commission for a city or town corporate being no county."

(D) Of their Division, and the Subordination of one Court to another: And herein,

1. In general, of the several Kinds of Courts which exercise a Jurisdiction.

Hale's An.
35.

THE most general division of our courts is, into such as are of record, or not; those of record are again divided into such as are supreme, superior, or inferior.

Hale's An.
35.

The supreme court of this kingdom is the high court of parliament, consisting of the king, lords, and commons, who are invested with a kind of omnipotency in making new laws, repealing and reviving old ones; and it is on the right balance of these three depends the well-being, and indeed the very being, of our constitution.

Hale's An.
36.

Superior courts of record are again, those that are more principal or less principal; the more principal ones are the Lords House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by Hale, such are the justices itinerant *ad communia placita* & *ad placita foreste*.

Hale's An.
36.

The less principal ones are such as are held by commission of gaol-delivery, *oyer and terminer*, assize, *nisi prius*, &c., by custom or charter;

charter; as the courts of the counties palatine of *Lancaster*, *Chester*, *Durham*; or by virtue of act of parliament, and the king's commission, as the court of sewers, justices of the peace, &c.

The inferior courts of record, as ordinarily so called, are corporation courts, courts leet, and sheriffs torn, &c. Hale's An. 36.

Courts not of record are the courts baron, county courts, hundred courts, &c.

Also, the admiralty and ecclesiastical courts, which are not courts of record, but derive their authority from the crown, and are subject to the control of the king's temporal courts, when they exceed their jurisdiction. Vide post of the Admiralty and Ecclesiastical Courts.

All these are bounded and circumscribed by certain laws and stated rules, to which, in all their proceedings and judicial determinations, they must square themselves. Hale's An. 35.

And here it may be proper to observe, that where a statute prohibits a thing, and appoints that the offence shall be heard and determined in any of the king's courts of record, it can be proceeded against (*a*) only in one of the courts of *Westminster-Hall*, because those being the highest courts of record, shall be intended only to be spoken of *secundum excellentiam*. Dyer, 236. 6 Co. 19. b. Cro. Jac. 538. Cro. Eliz. 737. Cro. Car. 146. Crompt.

Jur. 132. Salk. 173. (*a*) But that on a statute so worded, the prosecution may be in any court ofoyer and terminer. 4 Inst. 164. H. P. C. 261.

2. Of such as are of Record, or not.

Every court of record is the king's court, though the profits may be another's: if the judges of such court err, a writ of error lies; the truth of its records shall be tried by the records themselves, and there shall be no averment against the truth of the matter recorded. Co. Lit. 17. 8 Co. 38. b. 2 Lev. 92. 3 Lev. 205.

All such courts are created (*b*) by act of parliament, letters patent, or prescription, and (*c*) every court, by having power given it to fine and imprison, is thereby (*d*) made a court of record; the proceedings of which can only be removed by writ of error or *certiorari*. (b) Co. Lit. 260. a. (c) Salk. 200. pl. 1. Ld. Raym. 213. 252. 454.

(*d*) The leets and torns are the king's courts, and of record. 2 Inst. 143. 4 Inst. 263. Hetl. 62. S. P.—But neither the admiralty nor ecclesiastical courts are of record. Roll. Abr. 527. *Vide post* of these courts.—Nor the *English* court in Chancery proceeding by *judgments*. 37 H. 6. 14. 1 Roll. Abr. 527.—Nor the county court. Co. Lit. 117. b. 2 Inst. 380. 4 Inst. 264. Though plea held there by justices. 2 Inst. 140. 312. 6 Co. 11. b.—Nor the hundred court. Co. Lit. 117. 2 Inst. 143. 4 Inst. 264.—Nor the court baron. Co. Lit. 117. 2 Inst. 143. 4 Inst. 264.—The proceedings thereof may be denied, and tried by a jury, and a writ of false judgment, not of error, lies on their judgments. Co. Lit. 117. b.

A court, that is not of record, cannot impose any fine on an offender, nor award a *capias* against him, nor hold plea of debt or trespass, if the debt or damages amount to 40s. nor of a trespass done *vi & armis*, though the damages are laid to be under 40s. Co. Lit. 117. b. 260. a. 2 Inst. 312. 312. 14 H. 8. 15.

Also, by the statute of (*e*) *Gloucester*, the superior courts shall not hold plea of any (*f*) trespass under the value of 40s. (e) Made 6 E. 1. c. 8. (f) Trespass further, tit.

is put but for an example for debt, detinue, covenant, and the like. 2 Inst. 311. See *Abatement*, (K.)

2 Inst. 311. But the superior courts may hold plea of trespass, &c. though under 40s. relating to the freehold, as detinue for charters, &c. or trespass *vi & armis*.

Carth. 108. As where in trespass by way of original, the plaintiff declared, that the defendant *vi & armis clausum suum apud H. fregit*, and concluded *ad damnum ipsius* 20s., upon demurrer it was held well enough; for this being done *vi & armis*, if it could not be punished in the superior court, it could not be punished at all, for an inferior court cannot assess a fine.

3. How Inferior Courts must claim their Jurisdiction; and herein of pleading to the Jurisdiction, and demanding Conusance.

Carth. 11, 12. The courts of *Westminster* are the superior courts of the kingdom, and have a superintendency over all other courts by prohibition, if they exceed their jurisdiction, or writs of error, and false judgment of their proceedings; and every thing is supposed to be done within their jurisdiction, unless the contrary especially appears; on the other hand, nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged.

12 Co. 114. Sid. 103. In all transitory actions they have a jurisdiction, unless the plaintiff by his declaration (a) shews, that the action accrued within a county palatine; or if it be between the scholars of *Oxford* and *Cambridge*; in which case the university shall have conusance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars; and though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be (b) hindered from proceeding.

Carth. 11. — Nor can he take advantage of it by way of demurrer, but must plead to the jurisdiction of the court. Carth. 354, 355. (b) It was moved for an attachment against the registrar and commissioner of the court of requests, called the court of conscience, confirmed by the act 3 Jac. 1. c. 15. because that where *J. S.* had brought debt upon an obligation of 10*l.* for payment of 5*l.* in *B. R.* against a freeman of *London*; who after cited the plaintiff in the court of Conscience, surmising that less than 40s. was due, and the plaintiff appeared there, and shewed the obligation; notwithstanding, the commissioners there, upon allegation of the defendant, that less than 40s. was due, ordered the plaintiff to accept it, and stay proceedings in *B. R.*, which he refusing, the commissioners ordered the registrar to keep the obligation, so that the plaintiff could not proceed; upon which matter the court granted an attachment against the commissioners and registrar; for that court cannot any way prohibit or stay the proceedings in a superior court. Mich. 27 Car. 2. in *B. R.* 3 Keb. 533. S. C. ill reported.

4 Inst. 224. In local actions inferior courts have a jurisdiction, but here a difference must be observed as to the manner of claiming it; for as to the principal courts of this kind, and into which *brevia domini regis non currunt*, as the counties palatine, they may (c) plead their jurisdiction when intrenched upon by the superior courts.

Heine's Pleader 7. 351. Hans. 103. Tho. 2. Raft. 419. — So, may the jurisdiction of the *cinqüe parts* 4 Inst. 224. But *vide* Carth. 108. & Q. For it is there said to be such a franchise as *Ely*; and there resolved, that *Ely* being no county palatine, but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must demand conusance. — And note, that wherever the defendant can plead to the jurisdiction of the courts at *Westminster*, there the franchise may demand conusance; but not *vice versa*.

Roll. Abr. 489, 490. But where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts

courts at *Westminster* intrench on their privileges, they must demand (a) *conuſance*, that is, deſire that the cauſe may be determined before them; for the defendant cannot plead it to the jurisdiction; and the reaſon is, becauſe when a defendant is arreſted by the king's writ, within a jurisdiction where the king's writ doth not run, he is not legally conuened, and therefore may plead it to the jurisdiction; but the creating of a new franchise does not hinder the writ from being made out as before, nor the courts above from having the ſame jurisdiction over the cauſe, but grants jurisdiction to the lord of the liberty; and whenever the king's courts intrench on his jurisdiction, he may make his claim, and demand that the cauſe be determined before him.

placitorum, when the plea is commenced in one court, of which the conuſance belongs to another.

3. A conuſance with an excluſive jurisdiction; as that no other court ſhall hold plea, 509, 510.

No court can demand it unleſs it be of record, and of a plea of record; becauſe all courts of record are the king's, though another may have the profits of them; ſo that although the cauſe goes out of the king's courts at *Westminster*, yet it goes to another of the king's courts, to which he has granted the privilege of determining the cauſes ariſing within a limited jurisdiction; but it is below the dignity of the king's court to part with any cauſe to another's court, ſuch as the county court, &c.

Alſo, where a franchise cannot give a remedy, and there would be failure of juſtice, they ſhall not have conuſance, although the action accrued within their jurisdiction.

As in (b) a *quare impedit*, becauſe they cannot ſend a writ to the biſhop, nor in (c) *replevin*, becauſe if the plaintiff be nonſuited, a ſecond deliverance ſhall be granted, which the franchise cannot do.

S. C. 26 E. 3. 73. Dalf. 11. Co. Lit. 134. b. S. P. (c) 38 E. 3. 31. conuſance is not grantable, becauſe the original writ of *replevin* is in nature of a *juſtices*, and not returnable, and in a *juſtices* no conuſance can be demanded, becauſe none can demand conuſance but he that hath a court of record; but the county court, though the plea is hoſten by *juſtices*, is no court of record, and if the ſheriff ſhould grant the conuſance, he could not award a re-ſummons. 2 Inſt. 140. Bro. Conuſance, 4. 23.

Nor in waſte, becauſe by the ſtatute the writ muſt iſſue out of the Chancery at *Westminster*, and thoſe writs are returnable into the (d) king's courts there, and not into any inferior court.

be granted upon an attain, becauſe all attaints, per 23 H. 8. c. 3., are to be taken before the king in his bench, or before juſtices of the Common Pleas, and in no other court. Co. Lit. 294. Dyer 202a. Kelw. 210. N. Bend. 99.

Nor in admeaſurement of paſture, becauſe the franchise cannot grant a writ *de ſecondâ ſuperſeneratione*.

So, if a fine be removed out of a franchise by writ of error in *B. R.* and a *ſcire facias* iſſue out to have execution, they ſhall not have conuſance; becauſe the king never parts with the records of his court, and without it they can do no right to the party.

If a borough have an ancient charter, by which it was granted to them *quod nullus burgenſis inhabitans infra burgum præd. placit. vel implacitetur de terris, tenementis, contraſtibus*, &c. within the borough, elſewhere out of, &c. and the mayor and burgeſſes of the

(a) There are three ſorts of conuſance, 1. *Tenere placita*, which does not ouſt another court of their jurisdiction, but only creates a concurrent one. 2. *Cognitio* to another. &c. Hard.

2 Inſt. 140. Co. Lit. 117. b.

Dalf. 12. Roll. Abr. 489.

(b) 44 E. 3. 29. b. Bro. Conuſance, 12.

1 H. 4. 5. Dalf. 12.

(d) No conuſance can be granted. Dyer 202a.

Dalf. 123

50 Aff. 9. Bro. Conuſance, 61. Roll. Abr. 472. S. C.

N. Bend. 88. pl. 134

(a) So, the said borough are empleaded in *Banco* for lands within their borough, they shall not have consuance; for in this action (a) the whole body is empleaded.
 where consuance is granted to the chancellor of the university, to hold plea where scholars or privileged persons are concerned, this shall not extend to an action against the president and scholars of a college. 1 Mod. 163. [This case is erroneously reported,—the claim was allowed.]

21 H. 7. Kelw. 88, 89, 90. If the king grants *majori, ballivis, & juratis quinque portuum*, that they shall not be empleaded for land or other cause elsewhere, than within the said ports, yet in a *quo warranto*, &c. where the king is directly a party, they shall not be empleaded there.

[The like determination, in the case of a visitor because he ca. n. compel a specifick performance. Cowp. 378. So, where a college are to act in a trust. 1 Vez. 462.]
 If a scholar of *Oxford* or *Cambridge* be sued in Chancery for a specifick performance of a contract to lease land in *Middlesex*, the university shall not have consuance, because they cannot sequester the lands.

Lit. Rep. 252. Cripps and Webber. So, in (b) trespasss *quare clausum fregit, et damnum, &c. intravit in Oxford*, consuance was denied to the university, because the freehold might come in question.
 (b) So, for the same reason, it shall not be granted to them in ejectment, though nothing but a term for years be to be recovered. Lit. Rep. 252. Cro. Car. 87, 88. S. P. adjudged.

22 Aff 83. Roll. Abr. 493. If an action of (c) trespasss be brought for a trespasss done within a franchise, against a foreigner that hath nothing within the franchise, consuance shall not be granted, (d) because they cannot do right to the party, for they cannot amesne a stranger to answer who hath nothing within the franchise.
 22 Aff. 83. Roll. Abr. 493. (d) So, of a conspiracy against two, for a conspiracy within a franchise, of whom one is a foreigner, they cannot have consuance, for the action is entire. 22 Aff. 83.—So, an heir cannot be sued upon an obligation of his ancestor, within a borough, where he hath not assets within the jurisdiction of the court. Roll. Abr. 494. Cro. Jac. 502. 2 Roll. Rep. 48. S. C.

Lit. Rep. 40. 304. [3 Leo. 149. But see Bendl. 213, 234. Whopper v. Harwood, an attorney of C. P. for battery, consuance granted to the Bishop of Bath and Wells.]
 As they shall not have consuance where there is a failure of justice, so shall they not likewise where the plaintiff is a privileged person in any of the superior courts at *Westminster*; for it would be inconvenient, and below the dignity of those courts, that their officers should be compelled to quit their attendance, to obtain justice in an inferior court.

(e) Bro. Consuance, 50. & vide Carth. 12. (f) Hard. 505, 506. 2 Vent. 362. Hard. 189.
 But the defendant being in (e) *custod. mar.* in the King's Bench, or the plaintiff's commencing a suit in the Exchequer on (f) a *quo minus*, as debtor to the king, are not such privileges as will oust an inferior jurisdiction; for they are now grown the common methods of suing in those courts.

14 H. 4. 20. Nor can they have consuance of such actions as were not (g) But if an action of common law in *esse* at the time of their charter, but (g) created since by act of parliament.
 is given against a person by another name, as debt against an administrator, they shall have consuance. 14 H. 4. 20. 22 E. 4. 23.

As to the manner of demanding it, (a) if it be by attorney, the letter of attorney must be produced in court, and (b) if the consufance be demanded by virtue of a charter time out of mind, or by prescription, (c) there, an allowance must be pleaded before justices in eyre.

(a) Sid. 103. Lev. 87. S. C. and said, the warrant of attorney must be filed

in court, & vide Dal. 12. Palm. 446. N. Bendl. 233. pl. 262. Lane 81. 87. Sid. 283. (b) 9 Co. 27. b. 28. a. [Where cognifance of pleas is granted by act of parliament, it is unnecessary to fhew that the charter hath at any time before been allowed by the king's writ, or any of his fuperior courts. 2 Will. 412. — (c) Cognifance of pleas cannot be claimed by prefcription. Co. Lit. 114. b. 1 Salk. 184. But fee 4 Inst. 220.]

If by charter, confirmed by act of parliament, consufance of pleas, &c. is granted to the chancellor of Oxford, or his commiffary, the vice-chancellor, by his deputy, may demand it, though the vice-chancellor is but a deputy himfelf; for a (d) bailiff may properly demand consufance, and upon notice of the patent, the court ought to fuperfede.

Hard. 505. Cattle and Lite. field, adjudged. (a) Pro. Co. nufance, 36. 50. S. P.

But (e) a plea to the jurisdiction must be put in *propria perfona*, for the defendant cannot plead by attorney without leave of the court firft had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court; and if they put in a plea by an officer of the court, that plea must be fupposed to be put in by leave of the court.

(e) In fuch plea the defendant must make but half defence, for if he makes full defence,

as *quando & ubi cur. confideraverit*, he fubmits to the jurisdiction. Co. Lit. 127. b. — Must be pleaded before any imparlance. 2 H. 6. 30. 22 H. 6. 7. Hard. 355. Lutw. 46. [Vid. *supra* tit. *Alatem.* C. the authorities there cited.] — Except where ancient demefne is pleaded. Dyer 210. in margin. Style 30. Latch 83. — So, consufance must be demanded before imparlance, and the fame term the writ is returnable after the defendant appears; becaufe until he appears there is no caufe in court. Sid. 103. 6 H. 7. 9. 10.

4. Where it must appear that inferior Courts have a Jurisdiction.

Inferior courts are bounded, in their original creation, to caufes arifing within fuch limited jurisdiction: Hence it is neceffary for them to (f) fet forth their authority; for, as hath been already obferved, (g) nothing fhall be intended within the jurisdiction of an inferior court, but what is exprefsly alleged to be fo.

Roll. Abr. 545, 546. (f) Where the ftyle of the court must be fet forth, and

that they have power to hold plea by prefcription, or by letters patent of the king. Roll. Abr. 735. Cro. Eliz. 489. Moor 422. Owen 50. Noy 35. S. C. Cro. Jac. 184. 493. Yelv. 46. Moor 601. [Where the ftyle of a court fhall be helped by intendment, fee Gibbons v. Roberts, 1 Salk. 265. Where a fheriff is empowered by a private act of parliament to take inquisition of the value of lands, giving notice to the owners, the notice must appear on the back of the inquisition, to fhew that he hath a jurisdiction, elfe all the proceedings will be quafhed. Rex v. Mayor, &c. of Liverpool, 4 Burr. 2244.] — But where the proceedings of an inferior court need not be fet forth at large, but by way of *taliter proceffum fuit*. Vide 2 Lev. 81. 3 Lev. 403. Carth. 53. [2 Mod. 195. Lord Raym. 80. 1 Will. 316. 2 Will. 5. Cowp. 20. — Greater indulgence hath of late years been fhewn to inferior courts, and the prelumtion hath rather been in favour of their jurisdiction. In a juftification under the procefs of an inferior court it is fufficient to ftate that a plaint was levied for a caufe of action arifing within the jurisdiction, without fetting it forth at length, or alleging that the defendant became indebted there. Cowp. 20. 3 Term Rep. 185.] — (g) Sand. 74. Sid. 311. Same rule — whether Hull bridge fhould be intended within the jurisdiction of the court of Hull. Lev. 289. Vent. 72. *dubitatur*, & vide Style 200. Lev. 154.

Therefore if an action is brought on a (h) promife in a court below, not only the *promife* but the *confideration* must be alleged to arife within the inferior jurisdiction; for a debtor, who has contracted a debt, does not, by coming into the limits of fuch jurisdiction,

Roll. Abr. 545, 546. Several cafes to this purpofe. [See

too 1 Lev. jurisdiction, give such court authority to hold plea thereof; nor
 50. 96. 137. is it sufficient to allege the cause of action within the jurisdiction
 156. 2 Lev. of the court; but it must be proved upon the trial; and if the
 87. 1 Saund. plaintiff proves a consideration out of the jurisdiction, it cannot
 73. Ld. be given in evidence; and if it be, the defendant's counsel
 Raym. 1310. (i) may propose a bill of exceptions, and upon such bill of excep-
 2 Will. 16. tions the judgment will appear to be erroneous.
 Cowp. 20.
 Freem. 321.
 1 Term

Rep. 151.] (b) An inferior court cannot hold plea of an obligation, contract, battery, or other transitory action, if it was not made within the jurisdiction of the court. 2 Inst. 231. (i) Where he must plead to the jurisdiction, and if such plea be refused, an attachment lies. 2 Inst. 229, 230. 2 Lev. 230. Raym. 189. Mod. 81. But such plea must be put in *propria persona*, and whilst the court is sitting, and oath must be made of the truth thereof. 6 Mod. 146. — But *vide* Carth. 402. That a plea to the jurisdiction need not be on oath, as a foreign plea must. By 4 Ann. c. 16. § 11. no dilatory plea is to be received without affidavit of the truth, and the affidavit must state that the plea is true in substance. — Where upon the statute of *Westminster* 1. c. 35. a prohibition will be granted. Salk. 201. pl. 5. 202. and by F. N. B. 45, 46. 2 Roll. Abr. 317. Though the defendant by plea admits the jurisdiction, yet the superior court may grant a prohibition; but in 2 Mod. 271. Meudyke and Stint, it is adjudged, that after verdict and judgment, no prohibition lies; but there said, that if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so, if the subject matter in the declaration be not proper for the judgment and determination of such court; or if the defendant, who intended to plead to the jurisdiction, is prevented by an artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or if his plea be not accepted, or be over-ruled; in all these cases, a prohibition will lie at any time. 2 Mod. 273. — Where never, trespass, or false imprisonment lies. 22 E. 4. 31. 10 H. 6. 13. As where in an action of false imprisonment, the defendant justified the apprehending of the plaintiff by virtue of a parol command, and the prescription being that it must be by precept, (which must be understood in writings,) the plaintiff had judgment. Hob. 67. But an officer may proceed on his duty, and execute a process, though there be no cause of action, or though it arose out of the jurisdiction, unless the contrary appears to him. Salk. 202.

Saund. 74. But here a distinction must be observed between counties pala-
 Peacock and tine, and other inferior courts; for a county palatine is a general
 Beli, ad- court for all the subjects of the palatinate, and not merely for the
 judged. Sid. causes arising within that palatinate; for if a debtor goes from a
 331. S. C. foreign county into a palatinate, his obligations go along with
 him, as much as if he went from one kingdom into another; and
 if it were otherwise, a palatinate jurisdiction would be a shelter
 and *asylum* to debtors, for no process but the supreme preroga-
 tive process runs there; and therefore it is determined, that though
 the cause of action be out of the palatinate, yet if the party be a
 subject of that palatinate, as he is by coming into that dominion,
 that the action there may be brought against him.

Roll. Abr. In an action upon the case in the court of *Launceston in Cornu-*
 546. ad- *bia*, if the plaintiff declares, that whereas he was an attorney of
 judged. the hundred court of *Stratten in Cornubia*, the defendant having
 communication with J. S. of the said office, of the plaintiff, said
 these scandalous words of him within the jurisdiction of the said
 court of *Launceston*, *Thou art a cheater, &c.* after verdict for the
 plaintiff, and damages given, the judgment was reversed upon a
 writ of error; for the jury could not inquire whether the plaintiff
 was an attorney of the hundred court or not, being out of their
 jurisdiction; and this was the principal cause of the action.

Lev. 50. If in the marshal's court the plaintiff declares, that in consi-
 Ramay and deration the plaintiff, at the request of the defendant, had taken
 Atkinton, pains to procure him a lease of an house in *Holborn*; the defend-
 adjudged, ant *apud S. infra jur.*, &c. promised to pay him 10*l.* &c. this is
 and the judgment not sufficient to entitle the court to a jurisdiction; in as much
 in the Mer-

as it does not appear that *Holborn*, where the house stands, is within the jurisdiction, and the jury are not only to try the promise, (a) but the consideration also. *Shallice reversed. Sid. 65. S. C. (a) Judgment upon an assumpsit*, in consideration that the plaintiff would solicit a cause in Chancery, reversed for want of jurisdiction. *Vent. 23. & vide Lev. 289. 1 Vent. 72.*—Where in debt against an heir, if he pleads *riens per discent*, the plaintiff must reply assets within the jurisdiction. *Roll. Abr. 494.*

In an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place. *Sid. 87. Raym 75. Lev. 96. 205. 137. 208. S. P. Vent. 2. 243. 2 Lev. 87. Jones, 230. S. P.*

In debt for rent, upon a lease made *infra jur.* of an inferior court it must appear also, that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea. *Lev. 104. Sid. 101. Vent. 2. S. C. Drake and Beare.*

In an action for calling the plaintiff *whore*, by which she lost her marriage, the loss of the marriage must be laid within the jurisdiction, because the words are not actionable without special damage. *Sid. 85. 95. Raym. 63. Lev. 69. Salk. 404. pl. 1, 2. S. P. For the loss of marriage is the gist of the action, & vide Sid. 342. Lev. 153. Keb. 798. 837. March, 48.*

But if in an action upon the case in the court of *Bath, in com. Somerset*, the plaintiff declares, that he was a *tailor*, and that he used the said art for several persons inhabiting *tam infra civitatem prædict., quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him: *Thou hast stole as much cloth out of my suit and cloak which thou madest for me, as did make thy wife a waiſſet*; by which he lost his customers; the action lies in that court, notwithstanding the allegation *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages. *Roll. Abr. 546. Howel and Ireland, Cro. Car. 570. Jones, 450. S. C.*

So, if in the court of *H.* the plaintiff declares, that he lent his horse at *H.* for the defendant to ride to *B.* and that the defendant assumed at *H.* to re-deliver him, this is well enough; for it is not the riding, but the re-delivery, which is the cause of the action. *Sid. 151. 180. Vent. 72.*

So, in a writ of error of a judgment in the Palace Court, in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an inn-keeper) a gelding, safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled; it was objected as error, that the riding did not appear to be within the jurisdiction of the Marshal's Court; but *per cur.* in actions in inferior courts, it is necessary that every part of that, which is the gist of the action, should appear to be within their jurisdiction; otherwise of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remains as in this case; and therefore the judgment was affirmed. *Salk. 404. pl. 1. 2 Ld. Raym. 795, 796. Scamman and Davis, 6 Mod. 223. S. C. 11 Mod. 7. pl. 1.*

(E) What is incidental to all Courts in general.

Roll. Abr. 526. **I**F the king grants a court by letters patent, to a corporation of a town to hold pleas, &c. in this case, though there is not any clause in the patent to make a bailiff or ferjeant to (a) execute the procefs of the court, and to return juries, yet it is incident to their grant to do it; for otherways they cannot hold a court. inquiry of damages, without a clause in the patent for that purpose. Roll. Abr. 526.

Vide each respective court, & 11 H. 6. 12. Roll. Abr. 219. 8 Co. 38. b. 11 Co. 43. b. Cro. Eliz. 581. Sid. 145. Every court of record, as incident to it, may injoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving (b) opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody.

[For contempt in the face of the court, courts not of record may commit.] (b) As was the case of one Redding, who was convicted of tampering with Bedloe, one of the king's witnesses, in the popish plot, and endeavouring to make Bedloe deny what before he had confirmed, concerning several great persons engaged in the plot; for which he was adjudged to pay 1000 l., to stand in the pillory, and to be imprisoned for a year; and this conviction being before commissioners of *oyer and terminer*, of whom Sir Thomas Jones, and Sir William Dolben, judges of B. R. were two, he afterwards, being set at liberty, came into B. R. with an information against all the commissioners of *oyer and terminer*, and after having demanded the justice of the court, he said, that Sir Thomas Jones, and Sir William Dolben, contrary to *Magna Charta*, the king's oath, and their oath, have ruined me; for which words (a record being presently made of them) he was adjudged to be fined 100 l., and imprisoned till payment of it; to find surety for his good behaviour for seven year; and, being a barrister at law, his gown, by order of the court, was pulled over his ears by the tipstaff.

Lamb. 403. Lev 159. Brownl. 15. Raym. 100. Bro. Privilege, 35. Mod. 66. 20 Mod. 333. The courts of record, as incident to them, have a power of protecting from arrests, not only the parties themselves, but also all witnesses *eundo & redeundo*; for since they are obliged to appear by the procefs of the court, it will be unreasonable that any one should be molested whilst he is paying obedience to such procefs. Keb. 845.

Court of Parliament.

(A) Of the Original and Antiquity of Parliaments.

(B) Of the Persons of whom it consists.

(C) Of the Manner of their Summons and assembling.

(D) Of

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.
2. Of the Electèd, and their Qualifications.
3. Of the Duty of Returning Officers, and the Remedies against them, [and herein of the Mode of proceeding upon complaint of undue Elections.]

(E) Of the Method of passing Bills.

(F) Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.

(G) Of the Jurisdiction of the House of Lords.

Of the Privileges of Members, *vide tit. Privilege.*

(A) Of the Original and Antiquity of Parliaments.

TO trace out exactly the original and antiquity of the supreme court of parliament, whose transcendent jurisdiction, saith my Lord *Coke*, is such, that it maketh, enlargeth, diminisheth, abrogateth, repealeth, and reviveth laws, statutes, acts, and ordinances concerning matters ecclesiastical, capital, criminal, common, civil, martial, maritime, &c.; and to point out the several alterations it met with, and how it came to be modelled into the shape we see it at this day, seems indeed, if not impossible, a work of the greatest difficulty; but this difficulty is not to be attributed to any peculiar defect in our constitution, but only to time, the loss and destruction of our records, especially in the barons wars; nor have the prejudices and different views, which conducted the pens of those who have written on this subject, helped a little to obscure and perplex the matter.

Co. Lit. 110.
4 Inst. 35.

However, it appears by those lights which we have still remaining, and from the inquiries and reasonings of our best antiquaries, that there hath always been something of the nature of a parliamentary assembly, as ancient as any thing which we know of our constitution, in which the people shared with the prince in the legislative power: this assembly was sometimes called *magnates regni*, *omnes regni nobiles*, *proceres & fideles regni*, *universitas regni*, *communitas regni*, *discretio totius regni*, *generale concilium regni*, &c.

Spelm.
Gloss. in
verb. Parl.
Pryn's
Right of
the Com-
mons, 99.

In the Saxon times, the general court of the whole kingdom was the *Wittingham Mote* or *Witenagemote*, to which were summoned the earls of each county, and the lords of each leet; and likewise represent-

Willk. L. L.
Saxon. 205.
Lamb. Arch.
57. 237.

245. Mir- (a) representatives of towns, who were chosen by the burgesses of
ror, c. 5. the towns, and appeared on the king's summons; this court met
§ 2. once a year at least, and generally twice, about *Easter* and
(a) Sir Robert Atkins *Michaelmas*.

Says, that Spelman, Bede, Selden, and Camden, prove the commons to be part of this court; but they do not prove, says he, that they were elected, or that they consisted of knights, citizens, and burgesses. Sir Robert Atkins of the *Jurisdiction of Parliaments*, 25. — In the preface to Fortescue, of *absolute and limited Monarchy*, &c., it is said, that by reading the *Saxon laws*, and the prefaces and preambles to them, it will appear, that the commons of *England*, always in the *Saxon times*, made part of that august assembly — Spelm. Gl. ff. *verbo, subsidium*, the commons attended in extraordinary cases, as in granting new aids and taxes, as Danegelt, &c. and Maddox, c. 7, 8, 9. agrees herein, and gives us a full account of those aids and taxes, which he says were but seldom raised; the king, in those days, being abundantly supplied by his antient demesne lands, fines, forfeitures, &c.

See Wright's
Tenures.

Upon the coming in of *William the Conqueror*, every person found in arms against him forfeited his whole estate, in which he placed his *Normans*; and he compelled all those who were not in arms against him, to take out patents of their lands to hold of himself; and in order to this he made a general survey of the whole kingdom, which was called *domesday*, and changed the nature of the tenures, which in the *Saxon times* was *allodial*, into *feudal*, to be holden of himself by knights service; and by this means made the property of their estates depend on their allegiance to him: and hence it is, that all lands are said to be holden mediately or immediately from the crown.

(b) In Edward the Third's time, when the *modus accendi parliamentum* is supposed to have been written, they thought the usual subsistence of a knight could not be

The baronies and earldoms were antiently created by granting so many knights fees, viz. if the grant consisted of $13\frac{1}{4}$ (b) knights fees, the party was compellable to hold *per baroniam*; and he that had twenty knights fees, to hold as an earl (c); but when those grants came to be lost by time, they held both their honours and estates by the prescriptive right of possession; the earls and barons were wont to grant out lands to other vassals, to do certain duties, which depended on the bounty and agreement of the first grantor; and hence came all the fruit of the feudal tenure, as wardship, marriage, relief, &c., but those who held immediately from the crown, were called tenants *in capite*, and did suit only to the king.

less than 20 *l. per annum*, that of a baron 400 marks, and that of an earl 400 *l.* But Seld. tit. *Hon.* is of opinion, that there was no certain number of knights fees necessary to make a baron or earl, but that they consisted of so many knights fees as were contained in the charter. [(c) The feudal peerage was originally territorial; not attached to the person, but to the possession of the feudal estate. "The first form of the creation of an earl," according to the author of the *Essays on British Antiquities*, quoted by Sir J. Dalrymple in his *Essay on Feudal Property*, c. 8., "was that of a grant of an office over a county. When by the multiplication of earls, the earldoms were become more numerous than the counties, the form was to erect a particular estate into an earldom or county, which was all that was necessary to bestow upon the proprietor the territorial dignity. Afterwards, when the notion of personal honour crept in, certain solemnities were used at the creation of a peer, such as girding him with a sword, covering his head with a cap of honour and circle of gold, all of them marks of personal respect. And now, both in *England* and *Scotland*, the notion of territorial dignity being quite worn out, an earl's patent is so framed, as to import a mere personal dignity, without relation either to office, or to land." The castle of *Arundel*, however, still confers an earldom on its proprietor: the act of 3 Car. 1. c. 10., for annexing the castle and honour of *Arundel* unalienably to the title of Earl of *Arundel* in the heirs of Thomas then Earl of *Arundel*, in its preamble, speaks of the title as real and local. The barony of *Berkeley* of *Berkeley-castle* is also said to be territorial.]

Of the several
officers,
and the

Also, *William the Conqueror* erected a new court, called *curia* or *aula regis*, composed of his principal officers of state; to these, when

When any matter of moment was in agitation, as levying a new war, raising an escuage, &c., were called most of the barons, and chief persons who held *in capite*, and they transacted all business civil and criminal, and also that relating to the revenue, and were the great court-baron of the kingdom, where every thing done therein, was said to be done *per concilium regni*; it was in the election of the king to summon which of his attendants he pleased to this court; and such attendance being deemed a burthen in former days, the barons were seldom called, especially when they rose to that grandeur as to make such a concourse formidable to the king.

manner of
judicature in
this court,
vide Mad-
dox, c. 2, 3.

In this great assembly of parliament, it seems plain, that in the first reigns after the conquest, the commons of *England* were no part, and therefore the tenants in antient demesne, who used to maintain the king's table, and also those who held by burgage tenure, as by certain rent, setting out ships in the navy, &c., according to the nature of their patents, were wont, upon any extraordinary expedition, besides the duties of their tenure, to grant an aid to the king, which was demanded of them by the justices itinerant; and which, if they refused to pay, the king, at the end of the expedition, might, with the advice and consent of his council, tallage them to a tenth of all their estate, but not to more; for none could be taxed at pleasure but villeins, and those who held by base tenure.

Maddox,
491. Where
there is a
notable re-
cord of the
city of *Lon-
don's* being
tallaged, and
also decima-
ted for non-
pay-
ment; and
upon such
decimation
they were
obliged to
swear to the value of their goods. *Vide* Ryley, 516.

The great controversy, with respect to the original and antiquity of parliaments, relates chiefly to the power and first formation of a house of commons after the conquest. (a) Some have asserted that they have been always part of the ancient constitution, and that the commons of *England*, by their representatives, have always composed a part of that august assembly; (b) others hold, that the house of commons was formed 49 H. 3. when the king had given a total overthrow, at the battle of *Evesham* to *Symon Mountford*, Earl of *Leicester*, and the barons that adhered to him; and to derogate from the power of the commons, and to lay aside parliaments, a notion was propagated in king *Charles* the Second's reign, that they first arose by the art and management of *Symon Mountford*, to be a balance to the crown and peerage; and that their first institution was the invention of a rebel to serve a particular purpose.

(a) *Petit*,
Sir Robert
Atkins's
Power and
Jurisdiction
of Parlia-
ments, 14.,
and others.
(b) Camden
in his *Bri-
tannia*, 13.,
dates the
original of
the cum-
mons, as
part of the
parliament,
and as now
elected,
from the
39 H. 3.,

and says, he has it *ex satis antiquo scriptore*, but does not name his author; and herein he is followed by *Pryn*, in his plea for the lords, 182. *Dugdale*, in his *Orig. Jur.* 18. *Heylin's* life of *Laud*, 11. *Brady*, in his answer to *Petit*, 133, &c., *Sir Robert Filmer*, in his *Freeholder's Grand Inquest*, 18., and others, who think themselves sufficiently supported in this opinion, because the first writ of summons of any knights, citizens, and burgesses, now extant, is not ancienter than 49 H. 3.

But, as neither of these accounts seems to be the true one, the most probable opinion is, that the house of commons was instituted by the crown, as a balance to the barons, who were grown very opulent and numerous, and, as appears by their wars, very uneasy to the crown; hence we find, that upon the escheat of any barony for want of issue, or by forfeiture, the crown parcelled it out into smaller

Spelm.
Gloss. 60.
Seld. tit.
Hen. 692.

(a) But at what time they first sat, or were first digested into one house, with the representatives of cities and boroughs, does not well appear. By some opinions, they at first sat

smaller districts; and this begot the distinction between the *barones majores* and *barones minores*. These *barones minores* held by knights service, and, being too numerous to be all called to parliament, were allowed to (a) sit by representation. Hence we have the writ to chuse *duos milites gladiis cinctos*; to these were added representatives of cities and antient boroughs, who being equally concerned with the *barones minores* in all aids and taxes, it was reasonable they should share with them in those matters; and this policy was set on foot as a matter of the greatest service to the crown, both for the balancing of the peerage, and more conveniently taxing of the people.

with the *barones majores*; and hence my Lord Coke says, that lords and commons at first sat together, and made one house of parliament 4 Inst. 2. Selden does not determine the point, but says, that it was attempted, 17 John, to bring in the *barones minores*, as appears by the great charter granted by him at Runny Mead. Seld. tit. Hen. 704. But the more received opinion is, that it was accomplished in the victorious reign of Henry 3. who, instead of grasping at the liberties of his people upon his conquests, confirmed the great charter, and established a house of commons, as a balance to the peerage, which they never would have permitted before he had vanquished them Camden Britt. 13. Dugd. Orig. Jur. 18. Brady's answer to Petit. 133. It is plain, that that wise prince E. 1. went into this policy, and that in his reign we find a parliamentary peerage, or house of lords established, as also a house of commons, consisting of knights, citizens, and burgesses.

As one of the principal reasons for establishing a house of commons, was for the more convenient taxing of the people; hence we find the true reason why all taxations began in that house, and why the commons would never suffer it afterwards to be altered; and the reason is, that being at first instructed by their principals, whom they represented, to give what each man thought he could bear; to vary from these instructions, or to suffer the superior peerage to alter it, would, as they rightly judged, be the highest breach of trust in them.

Hence also we find the true reason why the power of judicature was reserved to the lord's house; for the *barones majores*, who constituted this house, were called to the antient *curia regis*, and sat there in their own right, as *patres curiæ* to the king; and as this court had a jurisdiction of (b) determining in the first instance, both in civil and criminal causes, especially those relating to great persons, and the king's officers of state, as also by way of appeal from the injustice of all other courts; so the lords continued to determine on petitions exhibited by private persons, or those exhibited by the house of commons, called impeachments, and were still the *dernier resort* to correct the errors of inferior judicatures.

Riley Pla. Par. 74. 156. Hollis Jud. of the Peers, 84. (b) A nobleman was tried by his peers very anciently, as appears by the earl of Hereford's case, in the time of William the Conqueror. 2 Inst. 50. — This turns on the principle of the feudal law, *si inter d. minum & vassillum lis moveatur pars curiæ sunt judices*; and therefore the peers, in the time of parliament were tried by the peers in the house of lords, and out of parliament by the justiciar, and in his absence by the steward of England, who summoned some of his peers upon the trial, and twelve at least were obliged to appear. This summons is set forth 3 Inst. 23. where my Lord Coke says, there must be twelve or more appear.

4 Inst. 46. At the first instituting of a house of commons, the representatives of knights, citizens, and burgesses, were only looked upon as trustees to manage the affairs of their principals; and therefore, in former days, it was held reasonable, that they should be recompenced by their principals, for the trouble and expence they were at in managing the trust reposed in them. Hence the fee of every knight of the shire was 4s. *per diem*, and that of a citizen or burgess 2s. *per diem*.

(B) Of the Persons of whom it consists.

THIS august assembly consists of the king sitting there in his royal political capacity; of the lords spiritual, as archbishops and bishops, who sit there by succession, in respect of their counties or (a) baronies, parcel of their bishopricks; of the lords temporal, as dukes, marquesses, earls, viscounts, and barons, who sit there by reason of their dignities, which they hold by descent or creation; these compose one house; and when any parliament is holden, each of them is to have a writ of summons *ex debito justitiæ*, of the (b) knights, citizens, and burgesses, who are chosen by force of the king's writ, which issues *ex debito justitiæ*, none of which ought to be omitted; these compose the house of commons, and represent all the commons of the kingdom.

their baronial possessions, a notion which hath been ably controverted by Bishop Warburton in his *Alliance between Church and State*, 4th edit. 1749. but which receives considerable support from the reasoning and authority of the learned editor of Coke upon Littleton. Co. Lit. 3 Ed. 154. b. n. 1.] (b) Of these in Fortescue's time, viz. H. 6. there were 300. *Fortescue de Laud. Leg. Ang.* c. 18. §. 4. in my Lord Coke's time, 493. 4 Inst. 1. At the time of the union, 513. And by the 5 Ann. c. 8. for uniting England and Scotland, 45 Scotch members were added, which makes the number at this day 558.

In the Saxon times, the lords spiritual held by *frankalmoigne*, but yet made great part of the grand council of the nation, being the most learned persons, that in those times of ignorance met to make laws and regulations; but William the conqueror turned the *frankalmoigne* tenures of the bishops, and some of the great abbots into baronies; and from thence-forward they were obliged to send persons to the wars, or were assessed to the escuage, and were obliged to attend in the king's court: this attendance they complained of as a burthen, and insisted, that the court took conusance of treasons and felonies, and that by the canon of *Toledo*, the clergy were forbid to give judgment in blood: to obviate this objection, the constitutions of *Clarendon* permitted them to withdraw in cases of blood; but still they were obliged to do suit, and such suit confirmed their estates as baronies, and as barons they sit in the house of lords at this day.

When a parliamentary peerage was established, which composed a house of lords, as also a house of commons, consisting of knights, citizens, and burgesses; Ed. 1. being under great difficulties through his wars in *Scotland*, and the kingdom being exhausted by the barons civil wars, thought, from his success in the holy war, that he had good pretensions to bring the clergy, who held by *frankalmoigne*, to contribute to the taxes and public charges of the kingdom; and accordingly projected a scheme, to make them a third estate dependant on himself; for which purpose was the *præmunientes* writ framed: this the clergy strenuously opposed; for though thereby they were to have a power of making cartons, yet they foresaw, that the principal design of it was to make them contribute to the public charges; and therefore they insisted that their power was totally derived from Heaven, and that they would not submit to any temporal power; but upon the king's

4 Inst. 2.
Right of
Electing to
Parliament,
106. 142.
181.
(a) Dyer, 60.
[Lord Hale
thinks that
the bishops
sit in the
House of
Peers by
custom and
usage, and
not from

Wake's Au-
thority of
Christian
Princes,
364. Stil-
ling. Bi-
shop's Juris-
diction, 367.
Sec.

Pryn, of
the Lord's
House, 221,
242.

persevering they came to this mind and temper, that the king might send his writ to the archbishop, and if he allowed the king's writ to be a good motive, the archbishop, by virtue of his spiritual jurisdiction, might summon them, and then they were convened by by a spiritual jurisdiction. From henceforward, instead of making one estate of the kingdom, as the king designed, they composed two ecclesiastical synods, under the summons of each of the archbishops; and being forced into this regulation, they sat and made canons, by which each respective province was bound, and gave aids and taxes to the king; but the archbishop of *Canterbury's* clergy, and those of *York*, assembled each in their own province, and the king gratified the archbishop's vanity, by suffering this new body of convocation to be formed in the nature of a parliament; for the archbishop assumed the state of a king, and his suffragans sat in the upper house, as his peers; the deans, archdeacons, a proctor for the chapter, represented the burgesses, and the two proctors for the clergy the knights of the shire; and so this body, instead of being one of the estates, as by (a) some it has been improperly called, became an ecclesiastical parliament to make laws, and to tax the possessions of the church.

(a) *Vide*
4 Inst. 1.
Vent. 324.

25 H. 8.
c. 10.
2 Salk. 412.
pl. 2.

At the reformation, by the act of submission of the clergy, these convocations were to be assembled only by the king's writ; whereas, before, they often met on a summons from the archbishop, without his receiving any writ from the king, because they looked upon him as having authority from Heaven; and by this act they could not make any canon without the king's licence, or put it in execution without it.

During the time of *Cromwell's* administration, the method of taxing was by way of land-tax and poll-tax; and though the clergy gave a subsidy the 13 *Car.* 2. yet it being most advisable to continue the method used in *Cromwell's* time, from henceforwards it passed, that they should have a vote for members in parliament, and they were taxed as the laity were.

4 Inst. 4.

Although the judges and masters in Chancery are summoned to attend the parliament, yet they have no voices; and therefore they sit round the table in order to assist the speaker, or the king, when present, in matters of law.

4 Inst. 266.

Nor has the chancellor a voice, unless he is a peer; for antiently he was none of the peers, unless he held *per baroniam*, and now he is none unless created by patent or summons.

[By the twenty second and twenty-third articles of the union, ratified by the act of union, the peerage of *Scotland* are to elect sixteen of their number to sit in the *British* house of lords; and other not elected peers of *Scotland* are to become peers of the united kingdom, and to have all the privileges of such, except a seat in that assembly.

Lords
Journ. 20th
Dec. 1711.

It was resolved by the house, soon after the union in the case of the Duke of *Hamilton* and *Brandon*, "that no patent of honour granted to any peer of *Great Britain*, who was a peer of *Scotland*, at the time of the union, should entitle him to sit and vote in parliament, or upon the trial of peers." And the same doctrine

trine was adhered to in the following case: the Duke of *Queensberry's* second son was created Earl of *Solway* in *Scotland*, when an infant; and afterwards the duke was created Duke of *Dover*, with remainder to such second son, and sat in two parliaments under this creation. But upon his death it was objected, and so resolved by the lords, that the *Scotch* earldom of *Solway* incapacitated the then claimant from taking the dukedom of *Dover* by virtue of such remainder. But these resolutions have been lately over-ruled. The peerage of *Brandon* hath been again claimed, when it was urged, that even supposing the former decisions to stand, still the patent was not void; that the incapacity to sit in parliament was only personal in the then duke, and his heirs in tail-male were entitled to the peerage of *Brandon*, with all its rights. The matter, however, was taken up in a more general view. For the entry in the lords journals in as follows: "After hearing counsel, as well " yesterday as this day, upon the petition of *Douglas* Duke of " *Hamilton* and *Brandon* to his majesty, praying a writ of summons to parliament by the title of duke of *Brandon*, the following question was put to the judges: Whether by the twenty-third article of the act of union, which declares all peers of *Scotland* to be peers of *Great Britain*, with all the privileges enjoyed by the peers of *England*, except the right and privilege of sitting in the house of lords, and the privileges depending thereon, the peers of *Scotland* be disabled from receiving subsequently to the union, a patent of peerage of *Great Britain*, with all the privileges usually incident thereto? the lord chief baron of the court of Exchequer delivered the unanimous opinion of the judges present upon the said question, that the peers of *Scotland* are not disabled from receiving, subsequently to the union, a patent of peerage of *Great Britain*, with all the privileges usually incident thereto:" whereupon a report was ordered to be presented to his majesty, certifying that the said Duke of *Brandon* is entitled to his writ of summons.

Lords
Journ. 14th
Jan. 1719
20.

Printed
Cases of the
Lords.

Lords
Journ. 6th
June 1782.

It was moved to put a similar question to the judges in the year 1711, but the motion was negatived.

In consequence of this decision several *Scotch* peers were soon afterwards created peers of *Great Britain*. But in the year 1708-9 the house had come to the following resolution; "That a peer of *Scotland*, claiming to sit in the house of peers by virtue of a patent passed under the great seal of *Great Britain* after the union, and who now sits in the parliament of *Great Britain*, had no right to vote in the election of the sixteen peers, who are to represent the peers of *Scotland* in parliament." And this resolution standing upon the journals unimpeached, it seemed to follow as a consequence of it, that the seat of one of the sixteen peers as a representative peer, became vacant upon his accepting, or succeeding to an *ineffective* seat: And therefore, upon the Earl of *Abercorn's* being created a peer of *Great Britain* in the year 1787, the house resolved, "That the Earl of *Abercorn* who was chosen to be of the number of sixteen peers, who by the treaty of union are to represent the peerage of *Scotland* in parliament, having been created Viscount *Hamilton*, by letters patent under the great seal of *Great Britain*, doth thereby cease to sit in this house as a representative of the peerage of *Scotland*."

Lords
Journ. 21st
Jan. 1708-9.

Lords
Journ. 14th
Feb. 1787.
The same resolution was come to at the same time re-

specting the
Duke of
Queensberry, who was
created Bar-
on Douglas.
Lords
Journ. 18th
May 1787.
21st April
1788.

Lords
Journ. 23d
May 1793.

6th June
1793.

June 1793.

4th March
1793.

6th June
1793.

“*land.*” And about this time the house shewed a strong disposition to adhere to these resolutions. For in the May following it was ordered, “That a copy of the resolution of *Jan. 21, 1788-9*; “be transmitted by the clerk of the parliaments to the lord clerk registrar of *Scotland*, with injunction to him to conform thereto.” And again in the next year it was resolved “That it is the opinion “of this house, that the lord clerk registrar and his deputies, “acting at the election of the *Scots* peers, ought to conform to the “resolutions of this house, of which they have had notice by “order of the house.” In consequence of these orders, the deputies of the lord clerk registrar refused to admit the votes of the Duke of *Queensbury*, Lord *Abercorn*, and other lords in a similar situation at the following general election in the year 1790. This refusal occasioned an application to the house on behalf of the two noble peers above-mentioned, when after a long investigation and considerable debate, the house was pleased to over-rule its former resolutions, and to resolve, “That the votes of the “Duke of *Queensberry* and the Earl of *Abercorn*, if duly tendered “at the last election for electing sixteen peers of *Scotland*, ought “to be counted.” And it was afterwards resolved, “That the “tender of the votes of the Duke of *Queensberry* and the Earl of “*Abercorn*, by sending to the lord chief registrar or his deputies “signed lists, together with proper documents of their having “qualified themselves as by law required to vote, was a due and “sufficient tender of their votes at the said election.” In pursuance of which resolutions the votes of these noble lords were added to the lists. These resolutions were followed by two protests, the one of which was signed by the Duke of *Leeds* and the Earl of *Kinnoul*, the other, by the Earl of *Lauderdale*.—The above resolution of 23d *May* having established, that the accepting or succeeding to an elective seat, posterior to the union, did not incapacitate a peer of *Scotland* from voting in the election of the representatives of the *Scottish* peerage, the inference which followed from the contrary doctrine was necessarily done away, and the succession to such a seat was determined not to vacate the seat of a representative peer. A motion, therefore, of Earl *Stanhope*, “That an humble address be presented to his majesty, “humbly to request that his majesty will be graciously pleased to “issue his royal proclamation for the election of a peer to represent the peerage of *Scotland* in the room of the Lord Viscount “*Stormont*, who since his election has become Earl of *Mansfield* “of *Middlesex*, and has taken his seat in the house accordingly;” was, after debate, negatived.

At the above election in 1790, Sir *James Sinclair* voted by proxy as Earl of *Caitness*, his claim to that dignity not having been allowed, but being then pending. His vote was objected to by the Earls of *Selkirk* and *Hopetoun*, who insisted, that he had no right to the title he assumed; or, supposing his claim should be admitted, yet as it was not actually allowed at the time of the election, he was not then in a capacity to vote. But the house resolved, “That “Sir *James Sinclair* had made out his claim to the title of Earl of “*Caitness*.” And that resolution was followed by another, “That “the

"the votes given by the Earl of *Moray*, as proxy for the Earl of *Caithness*, were good."

By 6 *Ann. c. 23. § 3.* the peers actually present at the assembly of the peers in *Holyrood House* in *Edinburgh*, are required before they vote, to qualify themselves by taking the oaths of allegiance, supremacy, and abjuration, and making and subscribing the declaration against popery. Those who live in *Scotland* and wish not to vote in person, may qualify in any sheriff's court in *Scotland*, and the sheriff or his deputy is to return the original subscription of the oath and declaration, signed by the peer who took the same, and make a return to the peers so assembled of such peers taking the said oath, and making and subscribing the said oath and declaration: and those peers who reside in *England* at the time of issuing the proclamation for election, may take and subscribe the oaths, and make and subscribe the declaration in the court of Chancery, King's Bench, Common Pleas, or Exchequer in *England*, which is to be certified by writ (a) to the peers in *Scotland* at their meeting under the seal of the court where the same were taken and subscribed; and peers who have so qualified may make a proxy, or send a signed list containing the names of sixteen peers of *Scotland* for whom they give their votes. And in case any peer of *Scotland*, who at any time before the issuing of the proclamation for election, hath taken the oaths, and subscribed the declaration in *England* or *Scotland*, to be certified as aforesaid, and, if taken in parliament, to be certified under the great seal of *Great Britain*, shall at the time of issuing such proclamation be absent in the service of the crown, such peer may make his proxy, or send a signed list.

(a) The following instrument was determined by the house, after reference to the judges, to be a writ sufficient in law to certify, according to this statute, that *Francis Viscount Dumbarton* on the day and year therein specified, appeared in Chancery, in open court, and took and subscribed the oaths and declarations therein mentioned.

Lords Journ. 5th Feb. 1792.—"George the Third by the grace of God, &c. To our most dear cousins "the peers of *Scotland* to be assembled and met at *Holyrood House* in *Edinburgh*, on *Saturday* the 24th day of *July* next ensuing, by virtue of our proclamation under our great seal of *Great Britain* lately issued, for the election of the sixteen peers of *Scotland* to sit and vote in the house of peers in the parliament of *Great Britain*, to be holden at *Westminster*, on *Tuesday* the 10th day of *August* next ensuing, greeting:—We have inspected a certain record and register in our court of Chancery in *England*, made and filed and there remaining, by which it is manifest, that on this fourteenth day of *June* 1790, *Francis Viscount Dumbarton* personally appeared in open court in Chancery aforesaid, and then and there took and subscribed the oath of supremacy, and repeated and subscribed the declaration contained and specified in a certain act of parliament, made in the sixth year of the reign of queen *Anne*, late queen of *Great Britain*, intituled "An act to make further provision for electing sixteen peers of *Scotland* to sit in the house of peers, &c." and also took and subscribed the oath of allegiance contained and specified in a certain act of parliament made in the first year of our late great grandfather, *George* the first late king of *Great Britain*, intituled "An act for the further security of his majesty's person and government, &c." and also took and subscribed the oath of abjuration contained and specified in a certain act of parliament made in the sixth year of our reign, intituled "An act for altering the oath of abjuration and the assurance, &c." according to the form, direction, and appointment of the acts aforesaid. Witness ourself the 12th day of *June* in the thirtieth year of our reign."

The above act provides, that such peers of *Scotland* as are also peers of *England*, shall sign their proxies and lists by the title of their peerages in *Scotland*; and that no peer shall be capable of having more than two proxies at one time. It also enacts, that no peer shall come to the meeting with more attendants than he is allowed by the acts then in force in *Scotland*, to take with him to the courts of justice; and that any peer who shall presume to propose, debate, or treat of any other matter, except the election, shall incur the penalties of a *premunire*.]

(C) Of the Manner of their Summons and assembling.

THE parliament commences by the king's writ or summons, agreeably to that rule which was established before the conquest, viz. that all judicature proceeded from the king. *William* the conqueror seems to have been more jealous of this part of his prerogative, than of any other, and from his time this rule has been regularly observed; anciently (a) some of the peers only were summoned, but when a parliamentary peerage was established, they summoned them all. Hence my Lord *Coke* (b) says, that every lord spiritual and temporal of full age, ought to have a writ of summons *ex debito justitiæ*.
 so numerous, as to be at one time about 3000. (b) 4 Inst. 1. — For the form of such summons, vide Cotton's Records, 3, 4.

Co. Lit. 9. b. 16. b. *Yde Pryn's Plea for the Lords House*, 147. where this matter is much controverted. (c) But in all degrees of quality above a baron, a summons is not sufficient, because there are other ceremonies requisite, which must be performed, unless dispensed with by letters patent; and these being matters of record must be produced. Seld. tit. *Hon.* 495. 530. Show. P. C. 5. Spelm. Gloss. 142.

Co Lit. 16. (d) And therefore, till he takes his seat, the blood is not ennobled, and if issue be joined whether he were a baron or no, it shall not be tried by a jury, but by record of parliament, which could not appear unless he were of the parliament. *Ibid.* But in the case of nobility by letters patent, the creation is perfect, and the blood is ennobled without sitting: and therefore in Lord Banbury's case, the court of King's Bench held, that a peerage, claimed under letters patent, is not triable by the record of parliament, but must be questioned by pleading *non concessit*. *Rex v. Knollys*, 1 Ld. Raym. 10. A writ of summons directed to any temporal person who sits in pursuance of it, gives a barony in fee, without words of limitation. 12 Co. 70. Co. Lit. 9. b. Seld. tit. *Hon.* 746. But letters patent, in which there are no words of limitation, give the grantee a dignity for life only. If the eldest son of a peer, created by letters patent, limiting the succession to the heirs male of his body, be called up by writ of summons to the house of lords by his father's baronial title, the effect of the writ in that case is not to enlarge the course of succession, so as to make a female capable of inheriting, but merely to accelerate the succession of the son to the barony; for the extent of the inheritance still depends on the nature of the father's title to the barony. Case of the claim to the barony of Sidney of Penhurst disallowed. Printed cases of the Lords, June 17, 1782.]

4 Inst. 4. (e) Of the manner of summoning The writ of summons issues out of Chancery, and recites, that the king, *de avifamento concilii*, resolving to have a parliament, desires *quod interfutis cum*, &c. each (e) lord of parliament is to have a distinct

a distinct summons, and such summons is to issue at least (a) forty days before the parliament begins. the judges, barons of the Exchequer, king's counsel, and civilians, masters in Chancery, who have no voices; and how the writ differs from that to a lord of parliament; *vide* Reg. 261. F. N. B. 229. 4 Inst. 4. (a) *Vide* the 7 & 8 W. & M. c. 25.

Also, a writ of summons must be directed to every sheriff of every county in *England* and *Wales*, for the choice and election of knights, citizens, and burgesses, within each of their respective counties. 4 Inst. 6. 10. Co. Lit. 109. b. [Upon a general election, the

writ of summons issues in consequence of a warrant from the lord chancellor to the clerk of the crown in Chancery; but if a vacancy happens during the sitting of parliament, or, by the death of a member, or his becoming a peer, in the time of a recess, then, in consequence of a warrant from the speaker; in the former of which cases, the speaker acts by order of the house; in the latter, under the regulations and restrictions of stat. 24 Geo. 3. c. 26.]

So, a writ of summons must issue out to the lord warden of the *Cinque Ports*, for the election of the barons for the same, who in law are burgesses. 4 Inst. 6.

The substance of those writs ought to continue in their original essence, without any alteration or addition, unless it be by act of parliament; for, if original writs at the common law can receive no alteration or addition, but by act of parliament, *a fortiori* the writs for the summons of the high court of parliament can receive no addition or alteration, but by act of parliament. 4 Inst. 10. [See the form of the writ, 1 Doug. 448. Heywood on Elect. 1.]

At the (b) return of the writ, the parliament cannot begin but by the royal presence of the king, either in person or by representation; by representation two ways; either by a guardian of *England*, by letters patent under the great seal, when the king is *in remotis* out of the realm; or by commission under the great seal of *England*, to certain lords of parliament, representing the person of the king, he being within the realm, in respect of some infirmity*.

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Every lord spiritual and temporal, and every knight, citizen, and burgess, shall upon summons come to the parliament, except he can reasonably and honestly excuse himself; or he shall be amerced, &c. that is respectively a lord by the lords, and one of the commons by the commons. 4 Inst. 43. & *vide* 6 H. 8. c. 16. That for departing without licence,

every knight, citizen, and burgess, shall lose his wages: also, it is such an offence, that the lords may fine one of their body; so, of the house of commons. 4 Inst. 44.

By the 30 *Car. 2. ff. 2. cap. 1.* it has been enacted, "That if any member of the house of commons shall vote in the house of commons, or sit there during any debate after the speaker is (c) chosen, without having first taken the oaths of allegiance and supremacy, &c. between the hours of nine and four, in full house, he shall be adjudged a popish recusant convict, be incapable of any office, &c. and shall forfeit 500*l.* &c."

abjuration oath with like penalties, which is also altered in its form by 6 Ann. c. 7. § 20. (c) Of the manner of choosing a speaker, *vide* 4 Inst. 8. 9.

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.

AS the right and qualifications of electors depend for the most part on several acts of parliament, it will be necessary to point out those statutes, as the surest rule to direct us in our inquiries herein; but here it may be proper to observe, (a) that the right and qualification of voters in cities, towns, and boroughs, depend on their charters, and such customs as have prevailed in their time immemorial.

Also it may be necessary to observe, that for the better ascertaining in general the right of voting, and for the greater security of returning officers, by the 2 Geo. 2. cap. 24. it is enacted, "That such votes shall be deemed legal, which have been so declared by the last determination in the house of commons; which last determination concerning any county, shire, city, borough, *cinque port*, or place, shall be final to all intents and purposes."

As the chief excellency of our constitution consists in our being (b) bound only by those laws to which we ourselves consent; and as such consent cannot be given by every individual in person, but must be by representation; it therefore highly concerns the whole community, that elections be (c) free, and that (d) every person claiming a right to vote, be duly qualified, free from corruption, or any undue influence whatsoever.

[This act is repealed by 28 Geo. 3. c. 2. § 31., so far as relates to determinations subsequent to that act.]
 (b) That it is one of the greatest privileges which a British subject hath; and therefore if he be hindered from voting, an action on the case will lie at common law. Salk. 19. pl. 10. 6 Mod. 45. Ld. Raym. 958. 3 Salk. 17. 8 State Tri. 89. Holt. 524. per Holt Ch. Just. And accordingly adjudged in the house of lords, in the case of Ashby and White. (c) By the common law all elections ought to be free; and by several statutes it is declared, that elections of members of parliament ought to be free, particularly by the 1 W. & M. sess. 2. c. 2. (d) In many cases multitudes are bound by acts of parliament, who are not parties to the elections of knights, citizens, and burgesses; as all those that have no freehold, or have freehold in ancient demesne; and all women having freehold or no freehold, and men within age of twenty-one years, &c. 4 Inst. 4. 5.

By the 10 H. 6. cap. 2. it is ordained, "That the knights of all counties within the realm, to be chosen to come to parliaments hereafter to be holden, shall be chosen in every county by people dwelling and (e) resident in the same, whereof every man shall have freehold to the value of (f) 40 s. by the year at the least, above all charges, within the same county where any such chuser shall meddle of any such election."

10 H. 6. c. 2. [In Scotland, by an act of James 6. A. D. 1587. c. 114. none were entitled to vote in counties, who had not a 40 s. land of old extent, holding of the king. By an act of Car. 2. A. D. 1661. c. 25. those voting on church lands were obliged to have 1000 l. Scots of present rent. By another act in that reign, A. D. 1681. c. 21. voters were obliged to have either a 40 s. land of old extent, or 400 l. Scots of valued rent. And by later statutes, still greater attention is required to the purity of the rolls.] (e) By 1 H. 5. c. 1. choosers of knights of the shire shall be resident within the same shires the day of the date of the writ of summons of parliament; & vide Crom. Jurif. 3. [The stat. 14 Geo. 3. c. 58. repeal so much of this and the act in the text and other old acts therein specified, as relates to the residence either of the elected, or electors.] (f) By the statute 8 H. 6. c. 7. he who cannot expend 40 s. by the year as aforesaid, shall in no wise be chooser of the knights for the parliament. [By subsequent statutes of 7 & 8 W. 3. c. 25. 10 Ann. c. 23. and 18 Geo. 2. c. 18. § 5. this qualification of a freehold estate of the clear yearly value of 40 s. must be over and above all rents and charges payable out of or in respect of the same, and the voter is required to swear that he is a freeholder, and has an estate of such value. Two committees have determined, that the interest of a mortgage is a charge, which, if it reduces the value under 40 s., takes away the vote; though there is an intermediate decision of a committee,

tee, wherein the contrary was holden. 2 Luters 467. The case of Wetherell v. Hall, B. R. M. 23 Geo. 3. which arose on a qualification under the game act of 23 Car. 2. c. 25. § 3. turned on a similar point, and received a determination agreeably to those of the two committees.]

[No person shall vote in right of any freehold granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40 l.

10 Ann. c. 23. The ft. 13 G. 2. c. 20. extends the regulations for the prevention of fraudulent conveyances themselves.

for election purposes to cities and towns which are counties of themselves.

Every voter must have been in the actual possession or receipt of the profits of his freehold, or been entitled thereto to his own use for one year before the election; except it came to him by descent, marriage, marriage-settlement, devise, or promotion to a benefice or office.

§ 2. Two or more votes may be given successively for the same estate or in-

terest at the same election; as, when a freeholder votes and dies, his heir or devisee may afterwards vote at the same election. And it seems to be generally true, that where no length of possession is required by any act of parliament, the elector may be admitted to vote, though his right accrued since the commencement of the election. 1 Dougl. 272. 2 Lud. 427.

No person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before the election. 2 Geo. 3. c. 24.

In mortgaged or trust estates, the person in possession, under the above mentioned restrictions, shall have the vote. 7 & 8 W. 3. c. 25. § 7.

Only one person shall be admitted to vote for any one house or tenement, in order to prevent the splitting of freeholds, and conveyances for that purpose shall be void. *Ibid.* But a husband may vote for his wife's right of dower, without an actual assignment of it by metes and bounds. 20 Geo. 3. c. 17. § 12.

No estate shall qualify a voter, unless it hath been assessed to the land-tax six months before the election, either in the name of the voter or of his tenant; but if he has acquired it by marriage, descent, or other operation of law, in that case, it must have been assessed to the land-tax within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenant of such person. 20 Geo. 3. c. 17.

No tenant by copy of court-roll shall be permitted to vote as a freeholder. 31 Geo. 2. c. 14.

No freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before. 3 Geo. 3. c. 15. This act, which is called the

Durham act, was occasioned by, and seems confined to, the admission of *honorary* freemen only.

In boroughs where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he hath actually been resident in the borough six months previous to the day on which he tenders his vote. 26 Geo. 3. c. 100. In burgage-tenure boroughs, no length of possession is required from the voters. 1 Dougl. 224.

(a) 7 & 8 W. 3. c. 25. § 8. Persons under twenty-one years of age (a), or persons convicted of perjury or subornation of perjury (b), or employed in managing and collecting the duties of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, are incapable of voting at any election (c).
 (b) 2 G. 2. c. 24. § 6.
 (c) 22 G. 3. c. 41. But this last act does not extend to freehold offices granted by letters patent, nor to commissioners of the land-tax, or persons acting under them.

2 Geo. 2. c. 24. § 7. Persons lawfully convicted of voting or with-holding their votes in consequence of a bribe, provided they are served with process within two years after the commission of the offence, are for ever disqualified to vote.
 9 Geo. 2. c. 3. § 8.
 By § 8. of the act of

2 Geo. 2. if the offender discover any other person offending against the act, so that such person be thereupon convicted, he thereby procures an indemnification for himself. But the discovery of an offender already indemnified, it hath been adjudged, will not avail him. Lord Portchester v. Petrie, E. 23 Geo. 3. B. R.

In general, it seems, that persons receiving alms are disqualified to vote. But by 18 Geo. 3. c. 29. § 25. parish relief given to the family of any militia-man, during the time of actual service, will not deprive him of his right to vote.

R. Nem. No peer hath a right to vote at any election, nor shall any lord lieutenant of a county concern himself therein. And by statute 2 W. & M. sess. 1. c. 7. the lord warden of the *cinque ports* shall not recommend any members there.
 Con. Feb. 1700. R. 24 Oct. 1702.

5 & 6 W. & M. c. 20. § 12 & 13 W. 3. c. 10. If any officer of the excise, customs, stamps, or certain other branches of the revenue, presume to intermeddle in elections by persuading any voter or dissuading him, he forfeits 100*l.* and is disabled to hold any office.

For the qualifications of electors in *Scotland*, see 6 Ann. c. 6. 9 Ann. c. 5. 12 Ann. sess. 1. c. 5. 7 Geo. 2. c. 16. 16 Geo. 2. c. 11. For elections for *Chester*, see 34 & 35 H. 8. c. 13. *Wales*, 35 H. 8. c. 11. *Durham*, 25 Car. 2. c. 9. *London*, 11 Geo. 1. c. 18. *New Shoreham*, 11 Geo. 3. c. 55. *Coventry*, 21 Geo. 3. c. 54. *Cricklade*, 28 Geo. 3. c. 36. § 41.]

2. Of the Elected, and their Qualifications.

4 Inst. 46, 47. A knight banneret, or any other under the degree of a baron, may be elected knight, citizen, or burghers.

Molloy, 382. An alien, though made a denizen, cannot sit in parliament; for to have a power of making laws, it is necessary that he should be totally received into the society, which he cannot be without the consent of parliament.

Coke, an alien naturalized is eligible. 4 Inst. 47. But now by 1 Geo. 1. stat. 2. c. 24. no person can be naturalized, unless there be a clause in the bill, expressly declaring him to be incapable of sitting in either house of parliament.] A sheriff is not eligible, Hale of Parl. 114. but this must mean for the county of which he is sheriff, for a sheriff of one county may be elected in another. Com. Dig. tit. Parliament. (D. 9.) cites 4 Inst. 48. [This doctrine has been sanctioned by two decisions of committees of the house of commons. In the first, it was determined, that the sheriff of *Berks* could not be elected for *Abingdon*, a borough within that county, 1 Doulg. 419: in the other, that the sheriff of *Hants* could be elected for the

the town of *Southampton* within that county, because *Southampton* is a county of itself, and is as independent on *Hampshire*, as on any other county. 4 Dougl. 87.]

One under the age of twenty-one years is not (a) eligible; neither can any lord of parliament sit there until he be of the full age of twenty-one years. 4 Inst. 47. (a) By the 7 & 8 W. 3. c. 25. § 8.

No person hereafter shall be capable of being elected a member to serve in parliament, who is not of the age of twenty-one years; and every election or return of any person under that age, is hereby declared to be null and void; and if any such minor, hereafter chosen, shall presume to sit or vote in parliament, he shall incur such penalties and forfeitures, as if he had presumed to sit and vote in parliament without being chosen and returned. [This law may be thought to be rather defective, for it remains to be inquired, what penalty is here ascertained, and what tribunal is to judge and pronounce sentence. 1 Wooddes. 46.]

None of the (b) judges of the King's Bench, Common Pleas, or barons of the (c) Exchequer, that have judicial places, can be chosen knight, citizen, or burghers of parliament; but any that have judicial places in the court of wards, court of dutey, or other courts ecclesiastical or civil, are eligible. 4 Inst. 47. Whitel on Gov. 370. (b) Because they sit in the lords house. 1 Bl. Com. 169.

[(c) So, by 7 Geo. 2. c. 16. § 15. none of the judges in *Scotland* can be elected. Thorp, a baron of the Exchequer, was speaker to the commons, Ann. 31 H. 6. 3 Com. Dig. tit. *Parliament*. (D. 9.) 4 Inst. 47.]

None of the (d) clergy can be elected knight, citizen, or burghers of parliament, because they are of another body, viz. the convocation. 4 Inst. 37. Moor, 783. pl. 2083. Bl. Com.

169. (d) Though of the inferior order. Com. Dig. tit. *Parliament*. (D. 9.) cites 4 Inst. 47. [But of late years, it hath been determined, that *deacons* are eligible to parliament, leaving the question undecided as to priests. Newport case, 2 Luters on Elect. 269. &c. The authorities to prove that the clergy are ineligible are books prior to the restoration, 4 Inst. 27. Moor 783. about which time the clergy, that is, the beneficed clergy, gave up the right of taxing themselves, 2 Burn's E. L. 27. (which tax always required the supplemental confirmation of parliament, *Id.* 22.) and received (that is, the beneficed clergy) as a compensation, though a very inadequate one, the privilege of voting at county elections: so, that it seemeth difficult to assign any reason for their exclusion at present. See further on this point, 1 Wooddes. 47-8. Whether a clergyman be eligible in *Scotland* is still matter of doubt, though it seems settled by practice, that he may be enrolled upon the roll of freeholders.]

A person attainted of treason, or felony, &c. is not eligible; nor ought, according to the writ, to be *magis idoneus, discretus & sufficiens*. 4 Inst. 48. Whitel on Gov. 370.

[So, *temp. H. 7.* Persons outlawed for treason could not come into parliament, till their attainders were reversed. Bac. H. 7. 13. Com. Dig. tit. *Parliament*. (D. 9.)

Nor persons outlawed after, or before judgment, in a civil action. Ruled by all the justices. 1 And. 293. Com. Dig. *ubi sup.*

Nor persons taken in execution upon a judgment.] Moor, 57. Com. Dig. *ubi sup.*

The king cannot grant a charter of exemption to any man, to be freed from election of (e) knight, citizen, or burghers of the parliament, because the elections of them ought to be (f) free, and his attendance is for the service of the whole realm, and for the benefit of the king and his people, and the whole commonwealth hath an interest therein. 4 Inst. 49. (e) Nor can the king grant a charter of exemption to a lord of parliament, to discharge him from his attendance in the lords house. 4 Inst. 49. (f) For the incapacities of sheriffs, mayors of towns, &c. and the reasons why they may or may not be elected knights, citizens, or burghers, vide 4 Inst. 48. Bro. Abr. tit. *Parliament* 7. Cromp. Jur. 3. 16. Sir Simon D'ewes, Jour. 38. 436. 624. Rush. Coll. Vol. 1. 684. Townsh. Coll. 185.

8 H. 6.

c. 7.

(a) As the writ for election of knights, &c. was *duos*

militis gladiis cinctos, &c., it required an act of parliament, viz. 27 H. 6. c. 15., That such *notable* esquires, gentlemen of birth, as are able to be knights might be eligible. 4 Init. 10. (b) The like is enacted by 1 H. 5. c. 1. as to knights, citizens, and burghesses; but these regulations being grown obsolete, are repealed by 14 G. 3. c. 58.

9 Ann. c. 5.

(c) Or mortgage, if the mortgagee has been in possession seven years before his election.

(d) 33 G. 2. c. 20.

(e) 5 & 6 W. & M. c. 7.

(f) 11 & 12 W. 3. c. 2.

12 & 13 W. 3. c. 10.

6 Ann. c. 7.

15 Geo. 2. c. 22.

(g) 6 Ann. c. 7.

(b) 22 G. 3. c. 45.

6 Ann. c. 7.

1 Geo. 1. c. 56.

6 Ann. c. 7.

2 & 3 Ann. c. 4. § 22.

6 Ann. c. 35. § 32.

7 & 8 W. 3. c. 4.

The treating vacates that election only; but the candidate is not

By the 8 H. 6. cap. 7. it is enacted, "That they who have the greatest number of voices that may expend 40*s.* by the year, and above, shall be returned (a) knights of the shire, &c. and that they which shall be chosen, shall be dwelling and (b) resident within the same counties."

[But now every knight of a shire shall have a clear estate of freehold or copyhold to the value of 600*l. per annum*, and every citizen and burghess to the value of 300*l. (c)*; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities. Of this qualification the member must make oath, and give in the particulars in writing at the time of taking his seat (d); or, upon refusal, the return is void.

No persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury (e), nor any of the officers following (f), viz. commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; commissioners of the revenue in Ireland; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of *Minorca* or *Gibraltar*; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hawkers and pedlars, nor any persons that hold any new office under the crown created since 1705 (g), are capable of being elected or sitting as members. Nor shall any contractor (h) with the officers of government, or with any other person for the service of the publick, be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it.

No person having a pension under the crown during pleasure, or for any term of years, is capable of being elected.

If any member accepts an office of profit from the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member, provided the office were prior to 1705, is capable of being re-elected.

No registrar (for registering memorials of deeds, &c.) within the west or east riding in the county of *York*, or his deputy, is capable of being elected.

No candidate shall, after the *teste* of the writ or summons to parliament, or after the *teste*, or the issuing out, or ordering of the writ of election upon the calling or summoning of any parliament, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons or to the place in general, in order to his being elected; upon

upon pain of being incapable, upon such election, of serving for that place in parliament. disqualified from being re-elected,

and sitting upon a second return. 3 Lud. 455. but *contr. Id.* 162.

The eldest sons of peers of *Scotland* are incapable of electing Comm. or being elected to represent any shire or burgh in *Scotland*.] Journ. 3d Dec. 1708.

This point hath lately been discussed with considerable ingenuity and ability in the house of lords on an appeal from a decree of the court of sessions. The question arose upon the claim of Lord Daer, eldest son of the Earl of Selkirk, to be enrolled a freeholder of the shewarty of *Kirkcudbright*, at the Michaelmas court in 1791. It was objected, (and it was the sole objection. for his lordship was admitted to be in every other respect qualified,) that his lordship being the eldest son of a peer of the realm, was incapable of being enrolled. The freeholders, however, admitted his claim; but upon an appeal to the court of session, the objection was sustained, and his lordship's name was directed to be expunged from the roll; and this decree was affirmed in the house of lords. *Lord Daer v. Johnstone and others*, printed cases of the lords, 26th March 1793.

3. Of the Duty of Returning Officers, and the Remedies against them; [and herein of the Mode of Proceeding upon Complaint of undue Elections.]

[We have seen above, that the writ of summons issues from the clerk of the crown in Chancery in consequence of a warrant from the lord chancellor, or speaker of the house of commons, according as the election is general, or not. Within three days (a) after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs within his county, commanding them to elect their members: and these officers are to proceed to election within eight days (b) from the receipt of the precept, giving four days notice of the same; and to return the persons chosen, together with the precept, to the (c) sheriff.

must be within *ten* days, with eight days notice thereof. (c) The notice must be given within the hours of 8 o'clock in the forenoon, and 4 in the afternoon from the 25th *October* to the 25th of *March* inclusive, and within the hours of 8 in the forenoon, and 6 in the afternoon from the 25th of *March* to the 25th *October* inclusive, and not otherwise. St. 35 Geo. 3. c. 64.

With respect to county elections, the sheriff, having indorsed on the writ the day on which he received it, shall, within two days after the receipt thereof, cause proclamation to be made at the place (d) where the ensuing election ought by law to be holden, of a special county court to be there holden for the purpose of such election only, on any day, *Sunday* excepted, not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth day.

act of parliament 20 Geo. 3. c. 1. for holding the election for *Hampshire* at *New Alresford*. So, for adjourning the poll from *Winchester* to *Newport* in the *Isle of Wight*. 7 & 8 W. 3. c. 25. 25 Geo. 3. c. 84. § 16.

Upon the day fixed for the election, the returning officer is first to take an oath against bribery, and for the due execution of his office. The candidates must, if required by each other, or by two electors, swear to their qualification; and the electors both in counties and boroughs to theirs; and the latter are also compellable to take the oaths of allegiance, supremacy,

23 H. 6.
c. 14. 7 & 8
W. 3. c. 25.
12 Ann.
Sess. 1.
c. 15.
(a) The
officer of the
Cinque Ports
has six days,
by 10 & 11
W. 3. c. 7.
(b) In *New
Soreham*,
the election
25 Geo. 3.
c. 84. § 4.
(d) The
sheriff can-
not alter the
place with-
out the con-
sent of all
the candid-
ates. See
an express

supremacy, and abjuration, and the oath against bribery and corruption.

34 Geo. 3.
c. 73.

And to prevent delays, the returning officer is required, at the request of any of the candidates, made in writing under his hand, to appoint commissioners to administer the oaths of allegiance, supremacy, and abjuration, who are to deliver a certificate to the party to whom the oaths have been administered, of his having taken them, upon the production of which he is permitted to poll in like manner as if he had taken the oaths before the returning officer.

25 Geo. 3.
c. 84. § 5.

All electors for cities and boroughs are likewise to swear to their name, addition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before at the election.

§ 1.

If a poll is demanded at any election for any county or place in *England* or *Wales*, it shall commence either on that day, or at the farthest upon the next, and shall be continued from day to day (*Sundays* excepted) till it be finished; and it shall be kept open seven hours at the least each day, between eight in the morning, and eight at night; but if it should be continued till the fifteenth day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of voices; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same, in which case he is to proceed thereupon; but so as that, in all cases of a general election, if he has the return of the writ, he shall cause a return of the members to be filed in the crown-office on or before the day on which the writ is returnable.

§ 3.

If he is a returning officer acting under a precept, he shall make a return of the precept at least six days before the day of the return of the writ; but if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within thirty days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him a power of administering an oath to those who *consent* to take it. And where there are objections to votes on each side, he shall decide alternately on them.

§ 6.

§ 3.

7 & 8 W. 3.

c. 7.

12 Ann.

1 Sess. c. 15.

25 Geo. 3.

c. 84. § 14.

Double damages may be recovered for any false return, tho' there have been no determination of the house

The scrutiny being finished, the sheriff must make a return of the persons who have a majority on the revised poll within the time limited by law. And the persons so returned are the sitting members until the house of commons, upon petition, shall adjudge the return to be false and illegal. For a false return, the sheriff, by the old statutes of *H. 6.* forfeits 100*l.* and the returning officer in boroughs 40*l.* and they are besides liable to an action at the suit of the party grieved, in which double damages shall be recovered. And they are also liable to such an action for wilfully neglecting, delaying, or refusing to return the person, whom the house of commons shall adjudge to be the legal representative.

sentative. And for any offences against the act of 25 Geo. 3. c. 84. they are punishable by information or indictment. of commons relative to the right of election for the place in question. Wynne v. Middleton, 1 Will. 125. — By stat. 7 & 8 W. 3. c. 7. the sheriff was liable to a penalty of 500*l.* for not making a return, at the return of the writ, if it were a general election, or within fourteen days, if an occasional vacancy. Any person bribing the returning officer forfeits 300*l.* 7 & 8 W. 3. c. 7.

When the election is over, the returning officer is bound, under a penalty of 500*l.* to deliver forthwith a copy of the poll to any person desiring it, and paying a reasonable charge for writing it. And the sheriff must within twenty days after a county election deliver upon oath to the clerk of the peace all the poll books of such election without any embezzlement or alteration; and where there are more than one clerk of the peace, the original poll books to one of the clerks, and attested copies to the rest to be kept among the records of the county. the peace. Rex v. Davies, 7 & 8 W. 3. c. 25. § 6. 10 Ann. c. 23. § 5. The check polls as well as the original books, must be lodged with the clerk of the peace. 2 Str. 1048.

If a person having a right to vote is hindered by the presiding officer, an action on the case lies at common law. Ashby v. White, 2 Ld. Raym. 938. 1 Salk. 19. 6 Mod. 45. 3 State Tr. 89. 1 Br. P. C. 45. But the obstruction must be wilful and malicious. Drewe v. Colton, Lent assizes for Cornwall, cor. Willson J. 2 Lud 245. Sargent v. Millward, 2 Lud. 248.

Whether it lies at common law for a false, or double return. 2 Lev. 114. 2 Ventr. 370. 3 Lev. 29. 2 Salk. 502. 1 Will. 127.

The returning officer, it seems, is not to judge of the disability of candidates. 1 Comm. Journ. 511. Journ. 201. 513. 515. 880. 11 Comm.

If the freedom of election is violated by any riotous and tumultuous proceedings, the sheriff may take the offenders into custody. But whether he may commit, where the election is not obstructed in any manner amounting to a breach of the peace, may admit of some doubt. 1 Comm. Journ. 826. 834. 837.

By the statutes of 10 Geo. 3. cap. 16. explained and amended by 11 Geo. 3. c. 42.; both of which are made perpetual by 14 Geo. 3. c. 15. and still farther improved by 25 Geo. 3. c. 84. 28 Geo. 3. c. 52. and 32 Geo. 3. c. 1. a tribunal is erected and regulated for determining the merits of contested elections. By these statutes, any person may present a petition complaining of an undue election; but one subscriber of the petition must enter into a recognisance, himself in 200*l.* with two sureties in 100*l.* each, to appear and support his petition; and then the house appoint some day beyond the days after the commencement of the session, or the return of the writ, and give notice to the petitioners and the sitting members to attend the bar of the house on that day by themselves, their counsel, or agents; which day may be altered; but notice must be given of the new appointed day. On the day fixed, if 100 members do not attend, the house shall adjourn from day to day, except over *Sundays*, and for any number of days over *Christmas-day*, *Whitsunday*, and *Good Friday*; and when two or more members are present, the house shall proceed to no other business, except swearing in members, receiving reports

ports from committees, amending returns, attending his majesty or commissioners in the house of lords, receiving messages from the lords, or on days appointed for the trial of any articles of impeachment exhibited by the commons in parliament, the business necessary for that purpose. Then the names of all the members belonging to the house are put into six boxes or glasses in equal numbers, and the clerk draws a name from each of the glasses in rotation, which name is read by the speaker, and if the person is present, and not disqualified, it is put down, and in this manner they proceed till forty-nine such names are collected. But besides these forty-nine, each party select, out of the whole number present, one person, who is to be the nominee of that party. Members who have voted at that election, or who are petitioners, or are petitioned against, cannot serve; and persons who are sixty years of age, or who have served before, are excused if they require it; and others who can shew any material reason, may also be excused by the indulgence of the house. After forty-nine names are so drawn, lists of them are given to the respective parties, who withdraw, and alternately strike off one (the petitioners beginning) till they are reduced to thirteen; and these thirteen, with the two nominees, constitute the select committee. If there are three parties, they alternately strike off one; and in that case, the thirteen choose the two nominees. The members of the committee thus formed are then ordered by the house to meet within twenty-four hours; and they cannot adjourn for more than twenty-four hours, except over *Sunday*, *Christmas-day*, and *Good Friday*, without leave of the house; and no member of the committee can absent himself without the like leave, upon special cause, verified upon oath. The committee cannot proceed to business with fewer than thirteen members (a); and they are dissolved, if for three successive days of sitting, their number is less than that: they continue to sit notwithstanding a prorogation of parliament. They are all sworn at the table of the house, that they will give a true judgment according to the evidence, and every question is determined by a majority. They may send for witnesses, and examine them upon oath. When the whole evidence is heard, they report to the house, whether the election be a due election or void, and also whether the petition or defence be frivolous and vexatious, in which case the party aggrieved shall recover costs: and the house, on being informed of such report by the chairman of such committee, order the same to be entered in their journals, and give the necessary directions for altering or confirming the return, or for issuing a new writ, or for carrying such determination into execution, as the case may require.

(a) If a committee have sat 14 days, 12 members, and if 25 days, 11 members, may proceed to business.

But when the committee are of opinion that the merits of a petition depend upon a question respecting the right of election, or the appointment of a returning officer, they require the counsel of the respective parties to deliver a statement of the right for which they contend, and the committee then report to the house those statements with their judgments thereupon; and if no person petition within a twelvemonth, or within fourteen days after the

But a renewed petition must be

commence-

commencement of the next session, to oppose such judgment, it is final and conclusive for ever. But if such a petition be presented, then, before the day appointed for the consideration of it, any other person, upon his petition, may be admitted to defend the judgment; and a second committee are appointed exactly in the same manner with the first, the decision of which committee puts an end to all further litigation on the point in question.] presented within 14 days after the commencement of any subsequent session, and upon its being presented, taking it into consideration. If petitions are not renewed within this time, the judgment of the committee upon the point in question shall be final and conclusive.

(E) Of the Method of passing Bills.

AN act of parliament must have the consent of the lords, the commons, and the royal (a) assent of the king; and (b) whatsoever passeth in parliament by this threefold consent, hath the force of an act of parliament.

4 Inst. 25.
Hob. 111.
Fortesc.
Laud. c. 18.
Dyer, 92.
(a) By the
33 H. 8. c. 21., The king's royal assent by his letters patent under his great seal, and signed with his hand, and declared and notified in his absence to the lords spiritual and temporal, and to the commons, assembled together in the high house, is as effectual as if the king were personally present. (b) Difference between an ordinance and an act of parliament is, that an ordinance wanteth the threefold consent, and is only ordained by one or two of them. 4 Inst. 25. [See Co. Lit. 159. b. n. 2. 13th ed.]

Anciently, the manner of proceeding in bills, was much different from what it is at this day; for, formerly, the bill was in nature of a petition, and these petitions were entered upon the lords rolls, and upon these rolls the royal assent was likewise entered; and upon this, as a ground-work, the judges used, at the end of the parliament, to draw up the act of parliament into the form of the statute, which was afterwards entered upon the rolls called the *statute rolls*; which were different from those called the *lords rolls*, or the *rolls of parliament*: upon these *statute rolls*, neither the bill, nor petition from the commons, nor the answer of the lords, nor the royal assent, were entered, but only the statute, as it was drawn up and penned by the judges; and this was the method till about *Henry the Fifth's* time: in his time it was desired, that the acts of parliament might be drawn up and penned by the judges before the end of parliament; and this was by reason of a complaint then made, that the statutes were not equally and fairly drawn up and worded. After the parliament was dissolved or prorogued, in *Henry the Sixth's* time, the former method was altered, and then bills *continentes formam actus parliamenti* were first used to be brought into the house; the bills (before they were brought into the house) were ready drawn, in the form of an act of parliament, and not in the form of a petition, as before; upon which bills it was written by the commons, *Soit baile al seigneurs*; and by the lords, *Soit baile al roye*; and by the king, *Le roy le veut* (b); all this was written upon the bill; and the bill, thus indorsed, was to remain with the clerk of the parliament, and he was to enter the bill thus drawn at first, in the form

(c) See Observations on Stat. 35.
Note (c).

(a) They were anciently proclaimed by the sheriff, but upon the invention of printing this method was discontinued; so that at this time every body is obliged to take notice of an act of parliament at his peril. 4 Inst. 26.

4 Inst. 34. In the lords house, the lords give their voices from the *puisne* lord *seriatim*, by the word of *content*, or *non content*.

4 Inst. 34. The commons give their voices upon the question by *yea*, or *no*; and if it be doubtful, and neither party yield, two are appointed to number them; one for the *yeas*, another for the *noes*; the *yeas* going out, and the *noes* sitting; and thereof report is made to the house. At a committee, though it be of the whole house, the *yeas* go on one side of the house, and the *noes* on the other, whereby it will easily appear which is the greater number.

4 Inst. 12. To the passing of a bill, the assent of the knights, citizens, and burghesses must be in person, but the lords may give their votes by proxy (b); and the reason hereof is, that the barons did always sit in parliament in their own right, as part of the *pares curtis* of the king; and therefore, as they were allowed to serve by proxy in the wars, so they had leave to make their proxies in parliament (c); but the commons coming only as representing the *barones minusres*, and the socage tenants in the county, and the citizens and burghesses, as representing the men of their cities and boroughs, they could not constitute proxies, because they themselves were but proxies and representatives of others, and therefore could not constitute a proxy in their place; according to that maxim of law, *delegata potestas non potest delegari*.

[(b) But not when they sit to exercise judgment.
Stand. Ord. House of Lords, 11th June 1689, and 11th March 1697. Svo. edit. 1748.
(c) They are now made by the king's licence. Elfr. c. 5.]

1 Wooddes. [Proxies from a spiritual lord are to be made to a spiritual lord; and from a temporal lord to a temporal lord; and no lord can receive more than two proxies: and a lord voting in a question must vote as proxy, if proxies are called for (d).
41. Elfr. and from a temporal lord to a temporal lord; and no lord can receive more than two proxies: and a lord voting in a question must vote as proxy, if proxies are called for (d).
c. 5. Ord. vote as proxy, if proxies are called for (d).
25 Feb. 16:5. *ibid*.
(d) Ord. 11th Feb. 1694. *ibid*.

Elfr. c. 5. It hath been made a question, if a proxy be given to two or more lords, and they differ, whose voice shall stand; which is said to have been resolved by the Earl of Manchester, lord president of the council, in favour of him who is first named in the delegation, and present. But according to Lord Coke, if three are proxies of the same lord, and all present, and one is content that a bill pass, and the other two are not content, this is no voice.

4 Inst. 13. The mere presence of the lord in the house, though he neither argue, consent, nor speak any thing, seemeth to be a revocation of his proxy.

Seld. 1 Vol. A lord may be summoned with a clause that he do not make, 2 P. 1476. a proxy.]

(F) Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.

THE parliament can neither begin nor end without the king's presence, either in person, or by (a) representation. 4 Inst. 48. (a) Vide 33 H. 8. c. 25.

The passing of any bill or bills, by giving the royal assent thereunto, or the giving of any judgment in parliament, doth not (b) make a session, but the session doth continue until that session be prorogued or dissolved. 4 Inst. 27. (b) That the courts of justice are to take notice of the time of the session. Raym. 191.

commencement of parliaments, and also of prorogations and sessions. Lev. 296. Raym. 191. Heth. 119. Dyer, 203.

The diversity between a prorogation and an adjournment, or continuance of the parliament, is, that by the prorogation in open court there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must at the next assembly begin again, &c. for every several session of parliament is, in law, a several parliament; but if it be only adjourned or continued, then there is no session, and consequently all things continue still in the same state they were in before the adjournment or continuance. 4 Inst. 27. Raym. 120.

When a parliament is called, and doth sit, and is dissolved without any act of parliament passed, or judgment given, it is (c) no session of parliament, but a convention. 4 Inst. 38. (c) The statute of *jeofails*, made in *Oxford*, 16 & 17 Car. 2. c. 8., was to continue and be in force for three years, and from thence to the end of the next session of parliament; but because the parliament convened next after the expiration of the three years, was prorogued without passing any act, the court held it no session, at least not such a session as was intended to determine the *forefaid* act. Raym. 187. Lev. 442. 2 Keb. 529.

The house of commons is, to many purposes, a (d) distinct court, and therefore is not prorogued or adjourned by the prorogation or adjournment of the lords house; but the speaker, upon signification of the king's pleasure, by the assent of the house of commons, doth say, this court doth prorogue, or adjourn itself; and then it is prorogued or adjourned, and not before; but when it is dissolved, the house of commons are sent for up to the higher house; and there the lord keeper, by the king's commandment, dissolves the parliament; and then it is dissolved, and not before. 4 Inst. 28. (d) Both houses must be prorogued together, and dissolved together, for one cannot subsist without the other. Sir Robert Atkins's Argument, 51. [It is not a prorogation of the house of lords or commons, but of the parliament. 1 Bl. Comm. 187.]

By the statute 4 E. 3. cap. 14. "Parliaments ought to be holden once a year, and oftner, if need be." Vide 36 E. 3. c. 10. to the same purpose.

By the 16 Car. 2. cap. 1. it is enacted, "That the holding of parliaments shall not be discontinued above three years at the most."

By the 6 W. & M. cap. 2. it was enacted, "That the parliament should have continuance longer than for three years at the farthest, to be accounted from the day on which, by the writs of summons, the parliament should be appointed to meet." 6 W. & M. c. 2.

1 Geo. 1.
St. 2. c. 38.

But now by the 1 Geo. 1. St. 2. cap. 38. it is enacted, "That the then present parliament, and all parliaments that shall at any time thereafter be called, assembled, or held, shall and may respectively have continuance for seven years, and no longer, to be accounted from the day on which, by the writ of summons, the parliament shall be appointed to meet, unless sooner dissolved by his majesty, his heirs or successors."

(G) Of the Jurisdiction of the House of Lords.

THE lords house is the highest court of justice in this kingdom, and the jurisdiction it exercises at this day, with respect to impeachments, the trial of its own members, writs of error, and appeals, is deduced chiefly from the jurisdiction and power of the king's antient court, or *aula regis*, established at the conquest.

This court, established by the conqueror, consisted not only of the principal officers of state, but also of such as held *per baroniam*, whom the king had a right to summon, as holding immediately from himself, to do suit in his court, and to hear causes; these were the *pares curtis* to the king. And hence this court was considered as the great court-baron of the kingdom, where all petitions against great persons, and the prince's officers, were heard.

Ryley, Fl.
Par. 156.

This court had not only an original jurisdiction of determining causes brought before them by petition, but was also the *dernier resort* to correct the errors of inferior judicatures; but as petitions began to multiply, there are several instances where original causes have been referred to inferior courts.

Every suit commenced by petition, containing the grievances certainly and particularly; and process was sent out to bring the defendant in to answer; when these petitions increased, receivers and triers of petitions, who determined what petitions were proper to be received or rejected, were appointed; and afterwards, upon the assembling of the knights, citizens, and burghesses, and their constituting a house of commons, the commons in matters of great moment, and as they were the grand inquisitors of the whole kingdom, presented their petitions; and as those petitions came stronger from them than from any particular person, so they were never rejected by the lords: and hence the original of impeachments by the house of commons.

[See a clearer account of parliamentary impeachments, 2 Wooddes. 596. 620.]

(a) This turns upon a principle of the feudal law, *si inter dominum & vassallum lis*

The great officers that constituted this court, were tried by their (a) peers, when this grand assembly or parliament were sitting; but out of parliament by the *justiciar*, and in his absence by the steward of *England*, who summoned some of his peers, and twelve*, at least, were obliged to appear.

moveatur paret curiae sunt judices; and this, as to treason and felony, is confirmed by the clause in *Magna Charta*, c. 29. *nec super eum ibimus, nec super eum mittimus nisi per legale judicium parium suorum vel per legem terre*; but for all other crimes out of parliament, as a *premeditated* riot, seducing a young lady from her parents in order to debauch her, &c., a peer at this day shall be tried by a jury. 2 Hawk. Pl. C. c. 44. § 13.

* Now, by stat. 7 W. 3. c. 3. § 11., on the trial of a peer, all the peers are to be summoned.

As this court was the *dernier resort* to correct the errors of inferior judicatures, so at this day there lies a writ of error of a judgment given in the King's Bench, before this court, which begins by petition to the king; whereto when the king hath answered *fiat justitia*, then goes out a writ directed to the chief justice of the King's Bench, for removing the record in (a) *presens parlamentum*; and thereupon the roll itself, and a transcript in parchment, is to be brought by the chief justice of the King's Bench into the lords house in parliament; and after the transcript is examined by the court with the record, the chief justice carrieth back the record itself into the King's Bench, and then the plaintiff is to assign the errors, and thereupon to have *scire facias* against the adverse party, returnable either in that parliament or the next, and the proceedings thereupon shall be *super tenorem recordi & non super recordum*.

as appeals and impeachments by the commons, do not abate by the prorogation or dissolution of the parliament. Sir T. Raym. 483. 2 Lev. 93. Comm. Journ. 23 Dec. 1790. Lords Journ. 16 May 1791.]

4 Inst. 21.
Vide tit.
Error.
(a) That writ of error may be returnable *ad proximum sessionem parliamenti*, vide Dyer, 375. And so of a *scire fac.* vide Fitz. tit. Error, 58. Rait. Ent. 805. [And that these, as well
Gibb. Hist. Ch. 190.

Towards the latter end of the reign of king *Charles* the First, the house of lords asserted their jurisdiction of hearing appeals from the Chancery, which they do upon a paper petition, without any writ directed from the king; and for this their foundation is, that they are the great court of the king, and that, therefore, as the Chancery is derived out of it, a petition will bring the cause and the record before them. This was much controverted by the commons in the reign of *Charles* the second, but is now pretty well submitted to; because it has been thought too much that the chancellor should bind the whole property of the kingdom without appeal.

Court of Chancery.

TOWARDS the *Norman* period, upon the breaking of the courts into distinct jurisdictions, the chancellor, or keeper of the great seal, retained part of that jurisdiction which he exercised in the great court of the kingdom, called *aula regis*: but for the better understanding hereof, and of its jurisdiction at this day, we shall consider this court,

(A) As an *Officina Brevium*, out of which all original Writs flow.

(B) As an ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

(C) As an extraordinary Court, proceeding according to Equity : And herein,

1. Of its original Jurisdiction.
 2. What Jurisdiction it exercises at this Day.
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(A) As an *Officina Brevium*, out of which all original Writs flow.

(a) 4 Inst.
80. Of su-
perfeding
fuch writs,
vide Abr.
Eq. 416.
and tit.
Writs.

BEfore the division of the courts, the chancellor put the seal to all patents, commissions, and writs: and hence this court is considered at this day, as the great shop of justice, out of which (a) all original writs, which give other courts a jurisdiction, issue, and are made returnable into such courts on a common return-day, and may be sued out at any time, as well in vacation as in term-time, from whence this court is said to be always open.

The reasons of the institution of this *officina brevium* were many.

1st, That it may appear that all power of judicature whatsoever flowed from the king, and therefore there was a summons even to the peers in parliament, that sat *in proprio jure*; so likewise for the lower house of commons; the basis of the same were made by writs that issued out of this court, and were returned into the same office; and so in judicature, there were particular patents that shewed the extent of the commission, and that their power was derived from the crown.

2dly, That the crown might have its proper fines: these were antiently paid to purchase justice from the crown; for persons were not suffered to come into the king's courts, and engage the power of the king to do right to private individuals, without first giving something towards the charges of the court, and the expence of the judicature; inasmuch as in antient times the king used to summon several of the barons to attend the hearing of such causes; but afterwards by *magna charta*, by reason of the exorbitancy of officers, and that the crown might not be cheated, these were reduced to fines certain.

3dly, The writs were taken out of the court of Chancery, returnable in the other courts, that one court might be a check upon the other.

4thly, To keep an uniformity in the law; for whether these writs went out to the sheriff in the nature of a *justicies*, or whether they were returnable before the justices in *eyre*, or justices of the common bench, or of assize, they were still made in one form, according to the nature of the complaint, which was both a direction to the judge, and limitation of his authority.

The court of Chancery being thus erected to issue process, the chancellor, or lord keeper, who had the government of that court, had the great seal, by authority of which all process was to issue; and from hence masters were appointed in that court, who made out the forms of the writs, and entered them in a book kept for that purpose, thence called the *register*; and such writs were precedents for the future, in like cases; and exceptions were taken to writs in the courts to which they were directed, for not agreeing with the *register*, and divers other informalities.

After the masters in Chancery had settled proper writs and commissions, and those things began to be of course, they had proper under-officers, who made out their writs of course, and they only attended on the making out of new writs in extraordinary cases, the ordinary writs being made out by the proper officers: hence it came to pass that the officer, called the clerk of the crown, made out commissions after the forms of them were settled, as commissions for justices errant, and of assises, general gaol-delivery, *oyer and terminer*, and of the peace, writ of association, *dedimus potestatem* for the taking of oaths, and all general and special pardons; also, writs of execution upon a statute-staple, which were annexed to this office in the time of Queen Mary, for their continual and chargeable attendance: other writs that were settled were made out by the *curfitors*, who were formerly clerks to the masters, but afterwards settled in a distinct office, to make the *brevia de cursu*.

At the first division of the courts, the Chancery was tender in making out writs in cases where there had been formerly no precedents in the antient *curia regis*, which now are called *actiones nominatae*, because they thought the antient footsteps which were in the former courts of justice, were the bounds of their jurisdiction, and indeed of the law; therefore, wherever there was a new case that seemed to require remedy, the original jurisdiction referred them to petition the next parliament: but because this multiplied petitions to parliament, therefore there was a particular law made, which gave the court power in a new case to invent a writ, and this was by the statute of (a) *Westm. 2. cap. 24. Et quotiescunque de cetero evenerit in cancellat. quod in uno casu reperitur breve, & in consimili casu cadente sub eodem jure & simili indigente remedio, non reperitur, concordent clerici de cancellaria in brevi faciendo, vel atterminent querentes in proximum parlamentum, & scribantur casus in quibus concordare non possunt, & referant eos ad proximum parlamentum, & de consensu jurisperitorum fiat breve, ne contingat de cetero quod curia domini regis deficiat conquerentibus in justitiâ perquirendâ.*

which cases there were not found any writs in the *register*.

Gillb. Hist. Chanc. 15. Dalrymp. Feud. Law, 304. 8vo. edition. (a) Upon this statute (which *vide* explained 2 Inst. 405. &c.) was formed the writ of entry in consimili casu, relating to land & alio, upon this statute were founded actions upon the case upon several trespasses, in 2 Inst. 407.

(B) Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

TO understand the nature of this court, we must observe, that in antient times the chancellor was likewise chaplain to the king, and it was his business, in the time of the *justiciar*, to write the *diplomata*, that is, all charters and commissions from the king; therefore, when the power of the *justiciar* was broken, he obtained the *officina brevium & chartarum regiarum*; from whence all the extraordinary jurisdictions touching the granting of charters, as likewise all inquests of office to entitle the crown, were returned into this office; and the Exchequer, in which these things were antiently transacted, became only an ordinary court of revenue, to (a) set leases to the king's farmers, and to get in the king's debts; and therefore the office in the Exchequer was only an office of instruction, of what lands were in the king in particular countries; but, to vest lands in the crown *de novo*, it was necessary to have an office under the great seal; and so, to grant lands from the crown, unless it were merely farms that were granted for years.

(a) *Vide*
2 Co. 16.
Plow. 320.
4 Co. 93.

4 Inst. 80.
(b) The proceedings in this court were heretofore in Latin, but were not enrolled in rolls, but remained only in *filicis*.

4 Inst. 80.

4 Inst. 80.
(c) That the judgment is to be given in B. R., and that for this purpose both courts are but one. *Vide* All. 16, 17.

Cro. Jac. 12. 2 Roll. Abr. 349. — So, if there be a demurrer for part, and issue for part, the whole record may be transmitted into B. R., and the judgment given there. 2 Sand. 23. Lev. 283. Mod. 26. (d) So, if the issue is to be tried otherwise than by a jury, as by the sheriff's certificate, &c. judgment shall be given in Chancery. Jones, 80. Latch. 3.

Abr. Eq. 128. pl. 8.
The King and Warocq of the Fleet.

From hence, at this day, this court has a jurisdiction to hold plea upon a *scire facias*, to repeal the king's letters patent upon petitions, *monstrans de droit*, traverses of offices, *scire facias* upon recognizances, executions upon statutes, &c. which being registered in this court, the process thereupon issued out of the same, and were returnable there, and entered in the office called the (b) petty-bag; whereas the writs, which were the foundation of the business of the other courts, were put together in the hamper, which gave the distinction to those names, and begat distinct officers in the court.

If in this court the parties descend to issue, the chancellor cannot try it, but is to deliver the record, with his proper hand, into the King's Bench, where (c) judgment is to be given, and the reason hereof seems to be, that the Chancery being *officina brevium*, if it could both make writs returnable here, and also try issues, it would inroach too much on other jurisdictions; besides, there was no jury process in the antient *aula regis*. But upon (d) a demurrer the chancellor shall give judgment.

An inquisition was taken, and a forfeiture of the office of warden of the Fleet found, and the defendant pleaded to issue, and after issue joined, several other persons came in by way of *monstrans de droit*, and pleaded, and a demurrer to them, and the record was carried into B. R. by the clerk of the petty-bag, without any order of the court, in order to have the issue tried; and it was resolved,

1st, That

1st, That though the clerk had committed a fault to the court of Chancery, in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer, is done by my lord chancellor, and may be said to be done *propria manu*. 2dly, That though there were an issue and demurrer both, yet the removing of the whole record was proper and well enough, on the (a) authorities cited in the margin, by which it appears, that judgment is most properly to be given in *B. R.* both on the issue and the demurrer; otherwise there might be two distinct judgments, and consequently, distinct executions taken out.

Also, all (b) personal actions, by or against any officer or minister, in respect of his service or attendance, may be determined in this court; but in these no jury process can issue, but the record is to be removed *ut supra*.

(a) 8 Co. the Prince's case.
2 Sand. 6.
23. 157.
2 Keb. 611.
Lev. 283.
Sid. 436.
Mod. 29.
S. C.
4 Inst. 80.
(b) But cannot hold plea of land.
2 H. 6 32.

(C) Of the extraordinary Court, proceeding according to Equity: And herein,

1. Of its original Jurisdiction.

THIS court was (c) newly erected after the division of the courts, and from a very small and inconsiderable beginning, hath (though (d) impugned even from its creation) grown up to that degree, as to swallow up most of the other business of the common law.

1: Co. 113. Dr. & Stud. c 7. — By Lamb. Archaion. 62. When the king's courts became settled in a certain place, then the king committed to his chancellor, together with his great seal, his only legal, absolute, and extraordinary pre-eminence of jurisdiction, &c. And in Lev. 242. it is said to be established by an act of parliament. 36 E. 3. But 2. (d) For which *vide* the petitions of the commons against this new invented jurisdiction. 3 H. 4. No. 69. 4 H. 4. No. 78. 3 H. 5. No. 46. Roll. Abr 327.

(c) That like the other courts of *Westminster*, it was time out of mind.
9 E. 4. 53. b.

That there were some footsteps in the ancient *curia regis*, the foundation of this jurisdiction, appears from the *English* jurisdiction exercised in the court of Exchequer, where, on informations on the king's behalf, articles are administered, to which the party is to answer upon oath; as likewise by impeachments in the house of lords, where articles are exhibited in *English* for the party to answer to.

But notwithstanding this, the establishment of this jurisdiction seems to be owing to the statute of *Westm. 2. cap. 24.* above-mentioned, by which a power was given, in new and extraordinary cases, to invent a new writ: Hence it was, that *John Waltham*, then bishop of *Salisbury*, and chancellor, as the commons mention in their petition, out of his subtlety, found out and began a novelty against the form of the common law, and that was the invention of the writ of (e) *subpoena*; which writ summoned the party to appear under a pain, to answer to such things as should be objected against him, and a petition was lodged in

Chancery,

(e) The *subpoena* seems to have been taken by the court of Chancery, in order to oblige a man to answer upon oath as to the truth of the plaintiff's allega-

tions, be-
cause it
came nearest
the common

Chancery, containing the articles to which he was obliged to answer; and upon such articles this new invented writ issued.

law process, called also a *subpœna*, which issues to bring in witnesses to attest the truth,

By this construction not only a new writ was framed, but a new jurisdiction erected, and this was towards the time of R. 2. occasioned chiefly by the statute of *Mortmain*; for when that statute had restrained the growing riches of the clergy, they found out this invention to avoid it, by giving away lands to trustees for pious uses, and the feoffees of such trust did the duties of such tenure in behalf of the trust; but if they perverted the trust, the ordinary jurisdiction not reaching a thing that was against the statute of *Mortmain*, the chancellor exerted this extraordinary jurisdiction, and examined them as to the several facts alleged against them.

After the establishment of this court, it was thought reasonable to give damages to such persons as were drawn into it by false suggestions, and therefore by the 7 R. 2. cap. 6. reciting,
“For as much as people be compelled to come before the king’s council, or in the Chancery, by writs grounded upon untrue suggestions, it is enacted, That the chancellor for the time being, presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him who is so troubled unduly.”

For the construction of this statute, vide 4 Inst. 83.

Cro. Eliz. 651. Brograve and Wat’s, 4 Inst. 84. Roll. Rep. 86. 100. Lit. Rep. 166. 27 H. 8. 15. 2 Ch. Cal. 43.

The jurisdiction of this court was not only impugned almost at its original creation, but even in the reign of Queen *Elizabeth* it was strongly holden by the judges of the common law courts, that the chancellor could not by his decree sequester the party’s lands, that is, could only *agere in personam*, but not *in rem*; and agreeably hereto it was resolved 19 *Eliz.* in the case of * *Coleston and Gardner*, that if a man killed a sequestrator in the execution of such process, it was no murder.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires, that the decrees of this court, which preserved men from deceit, should not be rendered illusory, that they could not long stand. But this process got the better of those resolutions, on these grounds: 1st, That the extraordinary jurisdiction might punish contempts by the loss of estate, as well as imprisonment of the person, because that liberty being a greater benefit than property, if they had power to commit the person, they might take from him his estate till he had answered his contempt 2dly, To say that a court should have power to decree about a thing, and yet should have no jurisdiction *in rem*, is a perfect solecism in the constitution of the court itself.

(a) As where a person committed to the Fleet for not per-

Also, in the reigns of Queen *Elizabeth* and King *James* the First, there are (a) several strong opinions, that a court of equity could not examine or give any redress in a cause after judgment at law, and that suits in equity, to relieve against a judgment at law,

law, are within the statutes, which make it a *premunire* to appeal to any foreign court, especially if the end thereof be to controvert the very point determined at law, or to seek relief after judgment in a case wherein the law may relieve, as against excessive damages, &c.

beas corpus out of the King's Bench, admitted to bail, and afterwards discharged. Cro. Jac. 341. And to this purpose, *vide* 4 Inst. 36. 91. 3 Inst. 123. Dalf. 81. Moor, 836. pl. 1129. 916. pl. 1300. Leon. 241. 2 Leon. 115. 3 Leon. 11. 2 Brownl. 97. Godb. 244. Roll. Rep. 71, 72. 252. 3 Bult. 118. 120. Lit. Rep. 37. Cro. Jac. 335. 344. March, 54. 83.

forming a decree made subsequent, and contrary to a judgment at law, was, by *La-*

But as these opinions tended to render the justice of this court illusory, whose peculiar province is to give remedies in cases not remedial by the ordinary jurisdiction, and to relax and mitigate the rigour of the common law; they seem now to be wholly exploded; and this seems highly reasonable, when it is considered how uncertain and doubtful the law in many cases is before it is determined; and consequently that before such determination it would be impossible to relax and mitigate the rigour thereof.

Cro. Jac. 341. pl. 1129. 916. Roll. Rep. 71, 72. 252.

Hard. 125. Mod. 59. 3 Keb. 221. Lev. 241. 2 Ch. Ca. 97. Abr. Eq. 150.

2. What Jurisdiction it exercises at this Day.

The ancient (*a*) rule for the jurisdiction of the extraordinary court of Chancery, was confined to frauds, accidents, and trusts; and though at this day, by its power in granting injunctions, it curbs the jurisdiction of other courts, and thereby has swallowed up the greatest part of the business of the common law; yet it is still under some of these notions that it exercises a jurisdiction in relieving against forfeitures, penalties, where a compensation can be made, in preventing multiplicity of suits, decreeing a specific execution of agreements, assisting defective conveyances, &c. but in no case will relieve against an act of parliament, directly against (*b*) a fundamental rule or maxim of the common law, nor retain a suit where the party appears to have a plain and adequate remedy at law.

(*a*) Three things, says my Lord Coke, are to be adjudged in a court of equity: 1. All covins, frauds, and deceits, for which there is no remedy by the ordinary courts of law. 2. Accidents, as when a serv-

ant, obligor, or mortgagor, is to pay money on a certain day, and they happen to be robbed in going to pay it. 3. Breaches of trust and confidence. 4 Inst. 34. 10 Mod. 1. See Cases temp. Taib. 40. (*b*) Therefore, if tenant for life or years levy a fine, or suffer recovery, equity will not relieve against the forfeiture. Peced. Chan. 570. —Also, upon this foundation, that a court of equity could not relieve against a maxim of the common law; it was formerly holden, that one executor could not compel the other to account. Roll. Rep. 261. —That one jointenant could not sue his companion. Roll. Abr. 376. —That if an obligee lost his bond, he was without remedy. —Roll. Abr. 375. —So, where the lessor entered upon his lessee, and suspended his rent, it was held, that he had no remedy. Latch. 149. —So, where the party became remediless by his own act, as by paying money without an acquittance. Roll. Abr. 374. —So, where one on valuable consideration promised to make a lease, it was held, that the party could not sue on this promise in equity, because he might have an action on the case. Roll. Abr. 380. But these last opinions are now of no weight or authority, as appears by daily experience.

All matters of trust are peculiarly within the jurisdiction of the court of Chancery; but if a trustee does by fraud and combination with the *cestui que trust* endeavour to evade any penal law, under pretence that a trust is only cognizable in equity, and that equity should not assist a (*c*) penalty, or (*d*) forfeiture, yet Chancery will aid remedial laws, and not suffer its own notions to be made use of to elude any beneficial law.

Abr. Eq. 131. *Vide tit. Uses and Trusts.*

(*c*) That a penalty cannot be demanded in equity. 2 Chan.

Ca. 81. (*d*) That all forfeitures must be waived, as in waste, so in a bill for the recovery of tithes. Vern.

Vern. 60. 2 Vern. 127. Vide Abr. Eq. 40. 127., &c. For the authority of the Chancery of Great Britain, see Stat. 149.

[Upon this head the Editor takes leave to refer the Student to the last chapter of the third volume of the *Commentaries*, and to Mr. *Ponblanque's* Notes upon the *Treatise of Equity*, where the principles upon which the court of Chancery exercises its equitable jurisdiction are traced in a most masterly manner. A clear and succinct account of the origin of the court of Equity in Chancery will be found in the third volume of Mr. *Reeves's History of the Law.*]

Court of King's Bench.

Maddox,
c. 19.
Bract. lib.
3. c. 7.
i. 105.

4 Inst. 70.
2 Inst. 24.
Co. Lit. 71.
Dyer, 187.
Crompt. of
Courts, 73.
Roll. Abr.
94.

TOWARDS the latter end of the *Norman* period, the *aula regis*, which was before one great court, where the *justiciar* presided, was divided into four distinct courts, *i. e.* the court of Chancery, King's Bench, Common Pleas, and Exchequer.

The court of King's Bench retained the greatest similitude with the ancient *curia*, or *aula regis*, and was always ambulatory, and removed with the king wherever he went: Hence the writs returnable into this court are *coram nobis ubicunque fuerimus in Angliâ*; and all records there are stiled *coram rege*, as it is still supposed to have always the king himself in person sitting in it; from whence it obtained the name of the court of King's Bench, and hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued, and was returnable into this court; but in trespass it might be made returnable into either the King's Bench or Common Pleas, because the plea was criminal as well as civil.

(A) Of the Jurisdiction of the Court of King's Bench: And herein,

1. Of its Jurisdiction in Criminal Matters.
2. Of its Jurisdiction in Civil Causes.
3. Of its Jurisdiction in reforming and keeping Inferior Jurisdictions within their proper Bounds.

(B) How far its Presence suspends the Power of all other Courts.

(C) Of the Form of its Proceedings.

(A) Of the Jurisdiction of the Court of King's Bench : And herein,

1. Of its Jurisdiction in Criminal Matters.

THIS court is termed the *custos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, adapts a proper punishment to it.

It has a peculiar jurisdiction, not only over all capital offences, but also over (a) all other misdemeanors of a publick nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment ; and it is not material whether such offences, being manifestly against the publick good, directly injure any particular person or not.

Precedent of the like nature formerly punished here, agreeing in all circumstances with 2 Hawk. P. C. *ubi supra*.

And for the better restraining of such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require ; and it may make use of any prison which shall seem most proper ; and it is said, that no other court can remove or bail persons condemned to imprisonment by this court.

Also, it hath so sovereign a jurisdiction in all criminal matters, that an act of parliament, appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude the jurisdiction of this court, without express negative words ; and therefore it hath been resolved, that 33 H. 8. cap. 12. which enacts, that all treasons, &c. within the king's house, shall be determined before the lord steward of the king's house, &c. doth not restrain this court from proceeding against such offences.

But where a statute creates a new offence, which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case.

Also, this court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on (b) a statute making a new law concerning an old offence.

entries. 9 Co. 118. *vide tit. Forcible Entry and Detainer*.—And the statute of Ph. & Ma. against persons taking away females under the age of sixteen years, from their guardians. Cro. Car. 465. 2 Inst. 549. 2 Lev. 179. 2 Mod. 128. 2 Jones, 53. 3 Keb. 75. 94. 106. 273.

But the court of King's Bench will not give judgment on a conviction in the inferior court, where the proceedings are removed

Sid. 163.

2 Hawk.

P. C. c. 3.

4 Inst. 71.

11 Co. 98.

2 Hawk.

P. C. *ubi*

supra.

(a) Nor is it

necessary to

show a pre-

cedent of the

present.

2 Hawk.

P. C. *ubi*

supra.

4 Inst. 549.

2 Jones, 53.

2 Hawk.

P. C. *ubi*

supra.

Sid. 296.

2 Hawk.

P. C. *ubi*

supra.

Dalt. 25.

44 E. 3. 31.

b. Crompt.

Jurisdic-

tion, 131.

(b) As the

statutes of

forcible

entry.

Cro. Car. 465.

Carth 6.

adjudged in

the case of

removed

one Baker,
who was
convicted at
Kingston
upon Hull,

moved by *certiorari*, but will allow the party to waive the issue below, and to plead *de novo*, and go to a trial upon an issue joined in *B. R.*

for speaking seditious words.

2 Hawk.
P. C. *ubi*
supr. and
several au-
thorities
there cited.

Nor can a record, removed into the King's Bench from an inferior court, regularly be remanded after the term in which it came in; yet if the court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they may in discretion refuse to receive it, and remand it back before it is filed.

4 Inst. 74.
Raym. 364.

Also, by the construction of the statutes, which gave a trial by *nisi prius*, the King's Bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript is set down.

(a) Extends
not to high
treason.
Raym. 367.

And by the 6 H. 8. cap. 6. it is enacted, "That the King's Bench have full authority, by discretion, to remand as well the bodies of all (a) felons removed thither, as their indictments, into the counties where the felonies were done; and to command all justices of gaol-delivery, justices of the peace, and all other justices, to proceed thereon after the course of the common law, as the said justices might have done, if the said indictments and prisoners had not been brought into the said King's Bench."

(b) 4 Inst.
73. 9 Co.
118. b.
(c) 4 Inst.
73.
(d) 4 Inst.
74.
Vaugh. 157.
Vide tit. *Bail*.

The judges of this court, are the (b) sovereign justices of *oyer* and *terminer*, gaol-delivery, conservators of the peace, &c. as also the (c) sovereign coroners; and therefore, where the sheriff and coroners may receive appeals by bill, *a fortiori* they may; also, this court may (d) admit persons to bail in all cases according to their discretion.

2. Of its Jurisdiction in Civil Causes.

17 E. 3. 50.
Roll. Abr.
536, 537.
(e) For the
exposition
of this sta-
ture, and
what shall
be said a
common
plea, *vide* 2

At the first division of the courts, the original intention appears plainly to have been to confine the jurisdiction of the court of King's Bench to matters merely criminal; and accordingly soon afterwards it was thus enacted by (e) *Magna Charta*, cap. 11. (f) *That common pleas shall not follow (g) our court, but be holden in a certain place*: Hence it is, that at this day this court cannot determine a mere real action.

Inst. 21, 22. Roll. Abr. 536, 537. (f) But these general words bind not the king, for he may bring an action there for a common plea. 2 Inst. 23. 2 Roll. Rep. 290. (g) This extends both to the King's Bench and court of Exchequer. 2 Inst. 25. 55c. But *vide* 4 Inst. 113.

2 Inst. 23.
4 Inst. 72.
113 & *vide*
2 Sand. 256.
Show. P. C.
57.

But notwithstanding common pleas cannot be immediately holden in *Banco Regis*, yet where there is a defect in the court, where by law they may be holden originally, they may be holden in *B. R.* As if a record come out of the Common Pleas by writ of error, there they may hold plea to the end; so, where the plea in a writ of right is removed out of the county by a *pone* in *B. R.* so, on a writ of mesne, replevin, &c.

So,

So, any action *vi & armis*, where the king is to have a fine, as ejection, trespass, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.* 2 Inst. 23.

Also, any officer or minister of the court, entitled to the privilege thereof, may be there sued by bill in debt, covenant, or other personal action; for the act takes not away the privilege of the court. 2 Inst. 23. 4 Inst. 71. 2 Bull. 123.

And this begat the notion, that if a man was taken up as a trespasser in the King's Bench, and there in custody, they might declare against him, in debt, covenant, or account; for this likewise was a case of privilege, since the Common Pleas could not procure the prisoners of the King's Bench to appear in their court; and therefore, it was an exception out of the statute of *Magna Charta*. 4 Inst. 71. Cro. Car. 330.

(a) By the statute of *Gloucester*, cap. 8., None shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth forty shillings. (a) It was a maxim of the common law *quod placita de catallis, debitis, &c. quæ summam 40 s. attingunt, vel eam excedunt, secundum legem & consuetudinem Angliæ sine brevis regis placitari non debent.* 2 Inst. 312. 6 E. 1. For exposition whereof, vide 2 Inst. 310., &c. put but for example; for so it is in debt, detinue, covenant, &c. 2 Inst. 391. Secus, in trespass *vi & armis*, where the king is to have a fine, for a fine cannot be assayed but by a court of record. 2 Inst. 391. F. N. B. 47. 3 Mod. 276. — So, in trespass for taking charters concerning a freehold; for it is a maxim in law, that such pleas shall not be in any court but of record. 2 Inst. 391. F. N. B. 47. Raym. 293. This course of making an affidavit, by experience, was so dangerous and troublesome, that it was forborne; and the defendant left to take such exceptions as the common law gave him. 2 Inst. 391. If upon nonsuit in an inferior court, 16 s. is given for costs, by 23 H. 8. c. 15. debt lies for it in *B. R.*, because given by a subsequent statute. Cro. Eliz. 96. Leon. 319. For as the inferior courts, which are not of record, regularly, cannot hold plea of debt, &c. or damage, unless under 40 s.; so the superior, which are of record, cannot unless above 40 s. 2 Inst. 391. [And though the demand, upon the face of the record exceed 40 s., yet now, (for the law formerly was different. *Oulton v. Perry*, 3 Burr. 1592.) the court will, upon motion, stay the proceedings. *Stearne v. Holmes*, 2 Bl. Rep. 754. *Kennard v. Jones*, 4 Term Rep. 495. *Wellington v. Arters*, 5 Term Rep. 64.]

3. Of its Jurisdiction, in reforming and keeping inferior Jurisdictions within their proper Bounds.

The court of King's Bench, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates, and all officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so (b) various in their kinds, that it seems needless to attempt to insert them. 2 Hawk. P. C. c. 34. Vaugh. 157. Salk. 201. pl. 3. (b) Where the court of King's Bench called the sheriff of

Middlesex, and appointed that watches should be strictly kept in the suburbs, and about the new building, as a thing belonging to the care of this court. Sid. 218.

Judgment was given in an action in the Sheriff's Court of *London*, and afterwards it was removed to the Mayor's Court by a *levata querela*, within which court there are four attornies, and by exclusive custom no other can be attorney there; and one of the attornies there was assigned to the plaintiff by the recorder; but because the present mayor was concerned in the cause, the said attorney, and all others refused to act for him: And by *Maynard*, no

Buxton v. Singleton, Hil. 26 Car. 2. 3 Keb. 432. S. C.

no person can withdraw himself out of the jurisdiction of this court, which hath superintendant power, if an officer refuses to do his duty; and he mentioned a case cited by *Noy*, where the Bishop of *Exon* refused to allow chrism, or baptismal oil to the parishioners of *D.* and a *mandamus* was directed to him out of this court: So, in all cases, as where the ordinary refuses to grant probate of wills, &c. *Wild* was of the same opinion, that if any court refuses to do justice, this court may command it; and in this case it will be in the power of the attornies to delay justice; and therefore the court sent for the recorder and informed him of the matter, and declared, that this was good cause to fore-judge the attorney, and that it was a dangerous matter to deny justice in such a manner; and mentioned the Abbot of *Crowland's* case, 20 *E. 4.* where the liberties were seized because he had not officers.

(B) How far its Presence suspends the Power of all other Courts.

H. P. C. 156. **9 Co. 118.** **27 Aff. pl. 1.** **3 Inst. 27.** **2 Hawk. P. C. c. 3.** **(a)** Or without notice. *Per 4 Inst. 73. Vide supr.*

THIS court being the supreme court of *oyer* and *terminer*, gaol-delivery and *eyre*, its presence suspends the power and avoids the proceedings of all other courts of the same nature in the county wherein it sits, during its sitting there, (a) especially if the justices of such courts have notice of its sitting.

4 Inst. 73. But if an indictment in a foreign county be removed before commissioners of *oyer* and *terminer* into the county where the King's Bench sits, they may proceed; for that the King's Bench not having the indictment before them cannot proceed for this offence.

4 Inst. 73. But if an indictment is found in the vacation-time in the same county in which the King's Bench sits, and in term-time the King's Bench is adjourned, there may be (b) a special commission to hear and determine it.

(b) That it is best if such commission bear teste in term-time. **3 Inst. 27.** & *vide* Keilw. 152. *Dyer*, 286. pl. 45. **2 Hawk. P. C. c. 3.**

(C) Of the Form of its Proceedings.

Vide head of *Process.* **THE** civil side in the King's Bench commences on a supposition of a trespass committed by the defendant in the county where it resides, and that he is taken up by process of that court, as the sovereign *eyre*, and committed to the marshal, in which case he may be declared against in any civil action whatsoever.

The first process therefore is a bill either real or feigned, and so called, because its foundation was the Bill of Complaint in court touching the trespass: on this is founded the *latitat*, which supposes that the defendant had escaped, and therefore issues in the

king's name, to apprehend the party wherever he may be found ; for the king has an universal jurisdiction over all his subjects, and, consequently, may call any of them that fled from the justice of his own court.

All process or writs of appeal, and all process on indictments removed hither by *certiorari* from a (a) foreign county, ought to be returnable *coram nobis ubicunque fuerimus* *. 2 Hawk. P. C. c. 3. (a) But all process upon bills of appeal against one in *custodiâ marescalli*, ought to be returnable *coram nobis apud Westmonasterium*. 2 Hawk. P. C. c. 3. Of indictments commenced in the King's Bench. 2 Hawk. P. C. c. 3. 2. — * And so are proceedings in civil suits, in this court, by original.

Also it hath been resolved, That where the court proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately ; but that where it proceeds on an offence removed by *certiorari* from another, there must be fifteen days between the *teste* and return of every process. 9 Co. 118. Co. Lit. 134. Lev. 61. Sid. 72. 2 Roll. Abr. 626. 2 Inst. 550.

Court of Common Pleas.

TOWARDS the Norman period, the power of the *justiciar* was broken, and the *aula regis*, which was one great court, divided into four distinct courts, as we have them at this day in *Westminster-Hall* ; the Common Pleas was established for the determination of (b) pleas merely civil, and was at first ambulatory, and removed with the king wherever he went ; but by (c) *Magna Charta*, cap. 11. *Communia placita non sequantur* (d) *curiam nostram, sed teneantur in aliquo certo loco*.

court was *placita coram*, &c. or *Common Pleas* ; the word *pleas*, anciently signifying the convention of the states *in campis*, viz. germanice in *placits* ; and because in those conventions of the states all causes were heard, debated, and determined, therefore, by corruption they got the name of *pleas* from the court where they were decided : Hence the court that was particularly erected to hear and determine such and such causes, was called the Court of Pleas. Duffr. 395. (c) That this court was not created by or soon after the making of *Magna Charta*, vide Co. Lit. 71. b. 2 Inst. 22. And for my Lord Coke's opinion of the antiquity of it, see the prefaces to the 8 & 9 Rep. and 8 Co. 145. [See also note 2. 13th edit. Co. Lit. 71. b. and Mad. Hist. Excheq. fol. edit. 63. 539.] (d) Before this act, common pleas might have been held in B. R., and all original writs were returnable there. 2 Inst. 21.

The jurisdiction of this court is founded on (c) original writs issuing out of the Chancery, which are the king's mandates for them to proceed on, to determine such and such causes ; these writs issue out of Chancery, because, when the King's Court was but one, the chancellor had the seal ; and therefore, when they were divided, he sealed all original writs. By this method the seal was a check on the other courts, to know what cause was VOL. II. L there,

same purpose is Fleeta, lib. 2. c. 34. f. 85. there, and likewise, that the (a) fines for having justice in the King's Court should be answered incontinently before there were any proceedings.

Britton, 2. b. says, On the establishment of this court, that they shall plead such common pleas as we shall command them by our writ, so that the proceedings on our writs may be recorded. (a) In Mad-dox, 293 to 314., there are variety of instances of fines recorded for having justices in king's courts. See Anc. Dial. of Excheq. 56.

4 Inst. 99. But this is to be understood when the cause is between common persons; for when an attorney, or any person belonging to the court, is plaintiff, he sues by writ of privilege, and is sued by bill, which is in nature of a petition; both which originally commence in the Common Pleas, and have no foundation in the Chancery.

4 Inst. 99. This court, my Lord Coke says, is the lock and key of the common law in common pleas; for herein are real actions, whereupon fines and recoveries pass; as also all other real actions by original writs: also, common pleas mixt or personal, in divers of which the King's Bench has a (b) concurrent jurisdiction with this court.

of King's Bench cannot be authorised to determine a mere real action; so neither can the court of Common Pleas, to inquire of felony or treason. 2 Hawk. P. C. 2. Vide tit. Court of King's Bench.

4 Inst. 99. This court, without any writ, may upon a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their (c) bounds and jurisdiction, without any original or plea depending; for the common law, which in these cases is a prohibition of itself, stands instead of an original.

Said to be adjudged by all the judges of England, Mich. 7 Jac. 1., and that there were several precedents to this purpose. (c) All prohibitions for encroaching jurisdiction issue as well out of the Common Pleas as King's Bench. Vaugh. 157. per Vaughan, Ch. Just.

Vaugh. 154. &c. & vide 2 Jones, 14. * So it may by the Habeas corpus act, 31 Car. 2. c. 2. This court, in term-time, may award a *habeas corpus* by the common law, * for any person committed for any cause under treason or felony, and thereupon discharge him, if it clearly appear by the return, that the commitment was against law, as being made by one who had no jurisdiction of the cause, or for a matter for which, by law, no man ought to be punished.

So, by the same statute, any judge of this court, may in the vacation award an *habeas corpus*.

4 Inst. 100. This court, upon an adjournment, upon a foreign voucher may hold plea likewise upon other foreign pleas, and upon general bastardy, *ne unques accouple in loiale matrimony*, &c. for none but the king's courts, and no inferior court, shall write to the bishop; so likewise upon ancient demesne pleaded.

Court of Exchequer.

- (A) Of the Nature and Antiquity of this Court.
- (B) In what Cases it has a Jurisdiction.
- (C) Of the Manner of its Proceedings.

(A) Of the Nature and Antiquity of this Court.

THE court of (a) Exchequer is an (b) ancient court of record, 4 Inst. 103.
for all matters relating to the revenue of the crown. (a) The common

derivation of the word is from the old *French* word *eschequier*, which signifies a *chefs-board*, or *chequer-work*; and because a cloth of that kind was laid upon the table upon which the accountants told out the king's money, and set forth their accounts, in the same artificial manner as is done in the cofferer's account at this day, it was called the Court of Exchequer. Maddox, 109. Spelm. Gloss. tit. *Scacc.* Fortesc. on *Monarchy*, the notes there, 117, 118. (b) It was formed from the Exchequer in *Normandy*, which was a court of sovereign jurisdiction, and superintended all manner of complaints, by and against the sheriffs and bailiffs who exercised an ordinary jurisdiction, and whose duty it was to gather the duke's rents in each bailiwick, and to account for the same in this great court; and as in the court of *Normandy* the great officers of state sat as judges; so with us, before the division of the courts, the great ministers, as the justiciar, constable, seneschal, chancellor, and treasurers, sat in this court; but the treasurer usually presided, as best acquainted with all matters relating to the revenue. Maddox, 109. *Vide* also for the antiquity of this court, and of its several officers, and their duty. 4 Inst. 103. Sav. 48. 2 Inst. 104, 105. 551.

In the (c) Exchequer there are seven courts, 1. The court of (c) The court of first Pleas. 2. The court of Accounts. 3. The court of (d) Receipt. fruits and tenths, erected *tempore* 4. The court of Exchequer (e) Chamber, being the (f) assembly of all the judges of *England*, for matters of law. 5. (g) The court of Exchequer-chamber, for errors in the court of Exchequer. 6. (b) The court of Exchequer-chamber, for errors in the King's Bench. 7. (i) The court of Equity in the Exchequer-chamber.

and the clergy discharged thereof by 2 & 3 Ph. & Ma. c. 4. But by the first of Eliz. c. 4., the first-fruits and tenths are re-united to the crown, but no court is revived, but the same to be within the rule, survey, and government of the Exchequer, &c. 4 Inst. 120.—The court of augmentations was erected by 33 H. 8. c. 39.; but Queen Mary, according to the power given her by the statute 1 Ma. c. 10., by letters patent dated 23 January in the same year, dissolved the same court: and the next day, by other letters patent, united the same to the Exchequer, which was utterly void, because she had dissolved the same before. 4 Inst. 118. Moor, 289. But *vide* Plow. 377. 542., and the Banker's case, where, by the opinion of Lord Sommers, the uniting of the court of Augmentations to the court of Exchequer was not absurd, nor an impracticable thing. (d) This is the true centre, into which all the king's revenue and profit ought to fall. 2 Inst. 197. (e) What causes are to be adjourned thither, and the method there, as to the arguing of them by the judges. 2 Bull. 146. Lev. 7. (f) 4 Inst. 68. 110. (g) Erected by 31 Ed. 3. c. 12. (b) Erected by 27 Eliz. c. 8. (i) The lord treasurer, chancellor, and barons of the Exchequer, are the judges of this court; and their jurisdiction is as large, for matters of equity, as that of the barons in the court of Exchequer, for the benefit of the king, by the common law. 4 Inst. 118.

(B) In what Cases it has a Jurisdiction.

(a) It hath been doubted, whether this is an act of parliament, or an ordinance only, made by the king, for the better order of this court. Plow. 209. 4 Inst. 113. — But 2 Inst. 551., it is said, there is a writ in the register, under title *Brevia de Statut.* which recites the words of this statute; and in the margin of the writ, *Statut. de Rutland* is quoted; so that without question this statute was made by authority of parliament. And 4 Inst. 113. it is said, it is entered in the parliament rolls, & vide 8 Co. 20. — But 4 Inst. 114. it is said, the writ is founded upon the common law and custom of the realm. (b) This is only in affirmance of the common law.

33 Aff. 20. The king's (c) farmer may sue one that detains from him part Roll. Abr. 538. of the possessions that he hath from the king, out of which the farm (c) So, of his is to be paid, by which he cannot pay his farm to the king. debtor *. 2 Inst. 551. — * And by this fiction, the court of Pleas hath a concurrent jurisdiction with the Common Pleas and King's Bench in civil suits, (except *real actions* and *quare impedit*.)

4 Inst. 112. The debtor (d) of the king's debtor may sue here by *quo minus*. (d) That the lessee of the king's lessee is not entitled to the privilege of the Court of Exchequer. Owen, 38. — [But see the preceding note, and the same fiction is used on the equity side.]

Sav. 134. An information for the queen and party, upon the statute Agard and Cavendish, of liveries, 8 E. 4. cap. 2. was brought in the Exchequer; though adjudged. by the express words of the statute it ought to be in the King's Cro. Eliz. Bench, or Common Pleas, before justices of the peace, &c. and 326. S. C. the Exchequer is not mentioned; yet it was adjudged it lay in *adjurratur*. this court, because the queen was party, and there were no nega- Moor, 564. tive words; without which, (e) this, being a superior court, shall S. C. upon a writ of have jurisdiction. error in Cam.

S. acc. reversed as to the informer; for the penalty was given to him only that informed in the courts specially named. 2 And. 127. S. C. reversed accordingly. (e) Plow. Com. 208.

38 Aff. 20. If the king's farmer sues in the Exchequer against a person for Roll. Abr. 538. detaining tithes, parcel of the possessions to him leased in farm by the king, though the right of tithes comes in debate between them, yet the court shall not be ousted of jurisdiction.

Lane, 100. If 7. S. be parson impropriate of D. and B. vicar there, and Roll. Abr. 538. S. C. the king patron of the vicarage, and there be a debate between the parson and vicar for tithes, the suit for these tithes ought to be in the Exchequer.

Lane, 39. If (f) a copyholder of the king's manor be sued in the eccle- Roll. Abr. 539. S. C. siastical courts for tithes, upon a suggestion in *Scaccario*, that he prescribed to pay a certain *modus decimandi*, he shall have a pro- (f) So, of the king's hibition there, and this *modus* shall be tried there. farmer. Lit. Rep. 525.

Lane, 55. If a man be amerced in the king's leet, and upon process out of Roll. Abr. 539. S. C. the Exchequer the bailiff distrain him for the amercement, and he bring trespass, he ought to bring this action of trespass in the office of pleas of the Exchequer; for the bailiff levied it as an officer of this court.

If an erroneous judgment be given in a *formedon* in a copyhold court, in the county where the king is lord, the party against whom the judgment is given may sue, by petition or bill to the king, in the *Exchequer-chamber*, in the nature of a writ of false judgment, for the reversal of this judgment; for as in the court of a common person, the proper suit for reversal thereof is to the lord, by petition; so it is here to the king; and the Exchequer-chamber is the more proper to sue to the king by petition than the Chancery, because it concerns the king's manor.

Roll. Abr. 539.
Lane, 98.
S. S. adjournatur.

An action of false imprisonment, or other action, may be brought against the under-sheriff, in the Exchequer, though the sheriff be the officer of the court, for the court takes notice of the under-sheriff also.

Roll. Abr. 539. Lane, 53. S. C. *Vide tit. Sheriff.*

If *A.* holds lands of the king by fealty and rent, and makes a lease thereof for years to *B.* and *C.* pretends a prior lease to him by *A.* though there is a rent issuing out of those lands to the king, yet neither *B.* nor *C.* can sue in this court by any privilege, in respect of the rent; for that the king can have no prejudice or benefit thereby; for, whether *B.* or *C.* prevails, the rent must be paid *.

4 Inst. 118.

But if the king extends lands, as the lands of *A.* for the debt of *A.*, and leases the same to *B.* for years, reserving rent, and *C.* pretends that *A.* had nothing in the land, but that he was seized thereof, &c. this is within the privilege of the court; (a) for if *C.* prevails the king loses his rent.

* *See qu.*
If he may not sue here, by using the common fiction?

against *A.* who detained goods from him, without which he could not answer the king; and *A.* came and claimed the goods as his tithe as parson of *B.*, and thereupon issue was taken for the king triable in the Exchequer. 4 Inst. 111.

4 Inst. 118.
(a) The king brought debt against a prior alien, and the prior had process.

If the king lease to *A.* for years, rendering rent, the king may distrain in all other the lands of *A.* for his rent, yet *A.* hath no privilege for his other lands, to bring them within the jurisdiction of this court.

4 Inst. 119.

If a man file a cross bill in this court, he need not entitle himself to the jurisdiction of the court, because the cross bill is grounded upon another bill in court.

Hard. 160.

So, if a man be sued in the office of pleas, he may have an *English* bill to be relieved against that suit, without setting forth matters of jurisdiction.

Hard. 160.

If *A.* is outlawed at the suit of *B.* and lands in the possession of *A.* are extended, and *C.* claims title to them, and pleads to the inquisition, if *C.* will bring an ejectment for them, it must be in this court, because the king's revenue is concerned.

Hard. 176.
[And if an action be commenced in another court, and it

appear from the pleadings, that the revenue is concerned in the event of it, the cause will be removed by such court into the office of pleas of this court. *Lamb v. Gunman, Parker, 143.*]

[There cannot be an information upon a seizure to condemn goods by proclamation, but only in the court of Exchequer; and the reason is, because, upon all such seizures, every person concerned may have and know a certain place to resort unto for his remedy in this kind.

Per Parker, C. B. Park. Rep. 69.

Bercholt
v. Candy,
Bunb. 34, 5.

And the court of Exchequer will remove an action brought in another court for the seizure of a ship, though no information is filed in it; but after the information has been tried in it, and a verdict for the defendant, they will not remove an action brought in another for the seizure.

Penny v.
Bailey,
id. 509.

So, an action of trover against an officer for goods seized and condemned, and also a great coat, saddle, &c. was removed upon an affidavit that the goods, &c. were actually condemned, and that the great coat, &c. were thrown in only to give colour.

Berkley v.
Walters,
id. 306.

But this court would not remove an action for taking ropes and cordage against an officer who had seized two cables, one of which only was foreign, and actually condemned.]

Hard. 193.
(a) Where
not allowed
to prosecute
in Chancery.
2 Vern. 146.
& vide

If A. hath title to lands under an extent out of the Exchequer, for debts in aid, he must bring his ejectment for them in this court, and having brought his ejectment for them in the (a) Common Pleas, upon motion, he was ordered to prosecute here.

Vern. 220. 469.

Sav. 22.

Hard. 334.
[(b) By the
privy seal,
1 Geo. 2.,
which em-
powers the
barons to
compound
or discharge

By the 33 H. 8. cap. 39. § 57. the court of Exchequer has power to discharge all debts and duties due to the king, upon any equity disclosed; and it is by virtue of this act that they discharge recognizances; and it seems by the said act, they may discharge penal laws made before this statute; but all penal laws made after the statute cannot be discharged, but must be compounded (b).

all forfeitures of recognizances, penalties, fines, issues, amerciaments, and other sums of the nature of recognizances, fines, issues, and amerciaments, whereby the subjects are chargeable to his Majesty, the court discharged a penalty fixed by statute, Rex v. Dibbens, Parker, 165. So, fines judicially set have been compounded. Nov. 21st, 6 W. & M. cited *ibid.* And now by stat. 4 Geo. 3. c. 10., the barons are empowered to discharge without any *quietus*, recognizances estreated into the Exchequer for neglecting to attend as parties or witnesses, or to prosecute indictments in any court of record, or at the assizes, &c. upon petition and affidavit on behalf of the persons who may be imprisoned, or be liable to be imprisoned on the forfeiture of such recognizances: but the act expressly provides that no discharge shall be given on such petitions where any debt is due to the crown, other than by the recognizances so prayed to be discharged; nor in any cases of defrauding the revenue by contraband trade, or assaulting the officers of the customs or excise in the execution of their duty, or any person lawfully assisting them therein.]

(C) Of the Manner of its Proceedings.

Sav. 10.

(c) By 13
& 14 Car. 2.
c. 11., no
writ of deli-
very shall

IF prohibited goods are seized, and proclamation made according to the course of the court, the owner shall not have them (c) delivered unto him upon security, without putting in (d) a plea, shewing cause why he should have them.

be granted but upon good security, and for goods perishable, or where the informer shall delay the trial.

[And even for perishable goods, it is discretionary in the court whether they will grant it or not. Parker v. Ashton, Bunb. 21. Vincent v. De Laar, Parker, 196. What shall be such a delay as shall authorize the awarding of a writ of delivery cannot be certainly stated: indeed, it seems to be generally agreed, that if a seizure be in the vacation, and there be no information filed the term following, if it could have been tried in that term, that this would be a delay to ground a writ of delivery upon. Johnson v. Sowers, Bunb. 30. Where it appeared in an information, that goods seized by the officer of commissioners of excise, were removed from one port to another without a permit, the court granted a writ of delivery, upon giving security, this being an unlawful importation, and therefore not within their jurisdiction. Warwick v. White, id. 106.]

(d) Upon a bill in equity to discover the value of cordage seized to the king's use, the defendant, in his answer, made title to it as his own; and upon giving

giving security had a writ of delivery, though the king claimed the property as his own goods, and not as goods forfeited. *Hard. 191.* But it was said, it would have been otherwise if the king's title had appeared by inquisition or other record.

Before the 5 R. 2. so great care was taken of the king's revenue, that no man might sue or plead for the discharge of any debt, account, or demand, in this court, without express command, or letter of the great seal. 4 Inst. 110.

But by 5 R. 2. cap. 9. this practice was declared illegal, and ordained, that the barons should have power to hear every answer of every demand in this court; so that every person, &c. may plead, sue, &c. without suing any writ or other commandment. 4 Inst. 110.

In case of an outlawry, it is the course of the Exchequer to prefer an information, in nature of a trover and conversion, against him that hath the goods of the party outlawed. Mod. 90.
Per Hale,
Ch. Just.

Court of the Constable and Earl Marshal.

IN the king's own court, established by *William the Conqueror*, there were high officers, called the (a) Constable and (b) Marshal, to whom chiefly belonged the cognizance of matters of honour, war, and peace; and therefore all foreign facts committed by the king's subjects were referred to them to determine, according to the law of nations and of arms. Maddox, 27.
Fleta, lib. 2.
c. 31.
Spelm.
Gloss.
(a) The
name is of
Norman ex-
traction, and came from their *Comes Stabuli*; there was the like officer in *France*, called *Le Constable de Franc*, who was the great general of the army, whose power was confined to matters of war only: But it seems the constable of *England* had a civil as well as a military jurisdiction, especially as to matters transacted in foreign parts: This office was created in *William the Conqueror's* time, and was anciently hereditary, and went to females: but, being an office of such high power and dignity, it became formidable to the crown; and therefore H. 8. got rid of it, since which there has been no such officer for a constancy, but only one created *pro hac vice*. *Vide* the notes to Fortesc. on Monarchy, 130. 48 E. 3. 3. 13 H. 4. 4, 5. 4 Inst. 127. Dyer, 285. (b) Of the several kinds of marshals that were attendants on the king's court, and the nature of their offices, *vide* Maddox, 31, 32, 33. And that the marshal who was joined with the constable, sat as judge with him, and was called the earl marshal, or marshal of *England*, *vide* Fleta, lib. 2. c. 3. Maddox, 33. Show. P. C. 60. Co. Lit. 74. 4 Inst. 123.

But to understand the nature and jurisdiction of this court, at present I shall consider,

(A) Of the Manner of holding this Court: And herein, whether it can be holden by Commission,
L 4 by

by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.

(B) In what Cases it has a Jurisdiction.

(C) Of the Form and Manner of its Proceedings.

(A) Of the Manner of holding this Court: And herein, whether it can be holden by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.

(a) So, resolved in Parker's case, Lev. 230., and Sid. 353. S. C. cont. Twissden, who held such commission illegal, and against the petition of right. 3 Car. 1. But per 2 Hawk. P. C. c. 4., such commissions, founded on the plain necessity of the case, and intended to prevent a failure of justice, as to cases of which no other court hath concurrence, seem not against the purview of the petition, which complains, that commissions had been granted for the trial of certain capital offences, and other outrages, by the martial law, &c.

IT seems (a) agreed, that during the lunacy of the earl marshal, this court may be holden before commissioners deputed to exercise his office.

(b) To this purpose are 13 H. 4. 46. 37 H. 3. 5. a. 48 E. 3. 3. 37 H. 6. 20. 30 H. 6. 6. 23 H. 4. 5. It has been a matter greatly debated, whether this court can be holden before the lord marshal only, without a constable; and those who are for the negative, ground their opinions chiefly on the statutes, (b) ancient law books, and records, which seem to mention the constable as the only, or at least as the principal judge of this court.

Rushworth's Coll. vol. 1. 107. S. P. C. 65. 2 Inst. 51. 3 Inst. 123. Co. Lit. 74. b. Crompt. Jur. 82.

Hob. 121. But notwithstanding this, the constant practice, especially since Roll. Rep. 87. the extinguishment of the hereditary office of constable in Henry 2 Lev. 134. the Eighth's time, of holding this court by the earl marshal only, Show. 153. and the general notions of our (c) judges and lawyers, of the legality of such court, seem in a great measure to establish a contrary opinion, and that at this day it may be holden before the (c) That in earl marshal only.

Queen Elizabeth and James the First, the judges assisted in this court, when holden before the earl marshal only. Show. P. C. 60. 4 Inst. 126.—& vide 2 Hawk. P. C. c. 4. That according to the common usage of other courts, which generally may be holden before one judge, in the absence of the rest, it seems a reasonable construction to allow this court to be so holden. [See upon this point a letter written soon after the Revolution by Dr. Plott to Lord Sommers, then attorney-general. Hearn's Disc. of Eminent Antiq. 2d ed. vol. 2. p. 250. Co. Lit. 72. b. note 1. 13th edit.]

2 Hawk. But it is agreed, that appeals of capital matters cannot be brought before the marshal alone, because 1 H. 4. cap. 14. which P. C. c. 4. shews how such appeals shall be brought, is express, that they shall be tried and determined before the constable and marshal of England.

If this court, holden before the earl marshal (a) only, exceeds its jurisdiction, it has been (b) resolved, that it may be prohibited by the common law courts.

(a) But if before the constable and marshal, &c.
P. C. c. 4.

See *vide* Show. P. C. 60, 61. (b) In Oldis's case, Show. P. C. 61. 65. 2 Hawk. P. C. c. 4.

(B) In what Cases it has a Jurisdiction.

THE jurisdiction of this court is declared by the 13 R. 2. *cap.* 2. by which it is recited, "That the commons made grievous complaints that the court of the constable and marshal daily incroached contracts and trespasses, and many other actions at the common law; and thereupon it is declared, That to the constable it appertaineth to have consufance of contracts touching deeds of arms, and of war out of the realm, and also of things which touch war within the realm, which cannot be determined nor discussed by the common law; with other usages to the same matters appertaining, which other constables before have reasonably used; joining to the same, that every plaintiff shall declare plainly his matter in his petition, before that any man be sent to answer thereto; and if any will complain that any plea is commenced before the constable and marshal, that might be tried by the common law, he shall have a privy seal to the said constable and marshal, to surcease till it be discussed by the king's counsel, if the matter of right pertain to that court, &c."

vide 8 R. 2. c. 5.
2 Hawk. P. C. c. 4.

And it is further enacted by 1 H. 4. *cap.* 14. "That all appeals of things done within the realm shall be tried and determined by the good laws of the realm; and that appeals of things done out of the realm shall be tried and determined before the constable and marshal, and that no appeal be made or pursued in parliament."

vide the several statutes
26 H. 8. c. 13.
35 H. 8. c. 2.
5 & 6 E. 6. c. 11.

1 & 2 Ph. & M. c. 10., and 2 Hawk. P. C. c. 4. as to its jurisdiction at this day, with respect to things done beyond sea.

As the jurisdiction of this court is restrained to things touching war within the realm, it can have no jurisdiction as to a civil matter, and therefore cannot proceed against a person for bare scandalous words, reflecting on the honour and gentility of families.

Rushworth's Coll. Part 2. vol. 2. 1055.
2 Hawk. P. C. c. 4.

Also, though the marshaling of publick funerals belongs to the heralds, who are the attendants of this court, and no other persons, without their licence, can lawfully intermeddle in it; yet it seems to be settled, that this court cannot punish those who shall be guilty of such an incroachment, because it is a proper ground for an action on the case; and by the above statutes, this court has nothing to do with matters which may be determined by the common law,

Lev. 230.
Sid. 353.
Show. Rep. 353.
Show. P. C. 58.
4 Mod. 123.

But by the constant practice, and the general opinion of lawyers, it seems at this day to have a jurisdiction as to disputes concerning

2 Hawk. P. C. c. 4.

cerning precedency and points of honour, and satisfaction therein; and may proceed against persons for falsely assuming the name and arms of honourable persons, &c.

(C) Of the Form and Manner of its Proceedings.

3 Inst. 125.
2 Hawk.
P. C. c. 4.

THIS court is to be governed by its own usages, as far as they go, and in other cases, by the civil law; but since it is no court of common law, no condemnation in it causes any forfeiture of lands, or corruption of blood; neither can an error in it be remedied by writ of error, but only by appeal to the king; yet the judges of the common law take notice of its jurisdiction, and give credit to a certificate of its judges.

Hutton, 3.

It is made a doubt, whether the king hath any remedy in this court against an offender, by way of indictment or information by the attorney general.

Of the Court of the Justices of Oyer and Terminer, and Gaol-Delivery.

Co. Lit. 293.
4 Inst. 184.
Bacon's
Elem. 15,
16.

JUSTICES of assize, *oyer* and *terminer*, and gaol-delivery, were appointed in the room of the justices in *eyre*, who formerly went their circuits once in seven years, and superseded the power of the sheriff's torn wherever they came, and transacted all manner of civil and criminal business; these were part of the king's court, who exercised their jurisdiction in the several counties of the kingdom, and, by communicating with the king's court, kept an uniformity in the law.

(A) Of the Manner of authorizing Commissioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

(B) Of their Jurisdiction when appointed.

(C) Of the Form of their Proceedings, and holding their Courts.

(A) Of the Manner of authorizing Commissioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

AS all justice proceeds from the king, so these commissions must receive their authority from the (a) prerogative of the crown; and this the common law requires, and it is also expressly enacted by the 27 H. 8. cap. 24.

Lamb. B. 1. chap. 5. Co. Lit. 114. Lev. 219. (a) That the king is the

proper judge, and may determine to whom, and upon what occasions, such commissions may be granted. 2 Inst. 419.

The common (b) form of these commissions is to authorize the commissioners, or three or four of them, of which number such or such a person is to be one, to inquire, by the oaths of twelve men, of all treasons, felonies, and misdemeanours, &c. in such and such place, and to hear and determine the same at such times and places as such commissioners shall appoint, &c. for which purpose the king acquaints them, that he has sent a writ to the sheriffs of such counties, commanding them to return juries before them at such days and places as shall be notified by them, &c.

4 Inst. 162. Crom. Jur. 131. Plow. 384. 2 Inst. 419. 2 Hawk. P. C. c. 5. § 30. (b) Whether such justices may be appointed as well by writ as by com-

mission; and for the difference vide 2 Hawk. P. C. c. 5. § 2. — That the court of sessions in London does not differ from other commissions of *oyer* and *terminer*, &c. Vaugh. 140.

The validity of such commissions must be determined according to their conformity to ancient precedents; and therefore a commission to a corporation, appointing some of its principal members to be justices of gaol-delivery, together with those whom the king shall appoint from time to time, was adjudged void; for such an authority, depending on the precarious appointment of other justices, is not agreeable to the known forms of such commissions. But new commissions of *oyer* and *terminer* may be added to the former by a writ, or commission of association, which, setting forth the purport of the former commission, adds new commissioners to those appointed by it; provided such new commissioners attend at the times and places appointed by the former; and it is usual to direct another writ to the former justices, commanding them to admit such new justices as their associates; but such writ (c) binds not such justices to admit the new ones, unless they also produce one directed to themselves; and such writ to the persons associated is always patent, but that to the others to admit them is close.

And. 296. 2 Hawk. P. C. c. 5. § 2. Reg. 124. F. N. B. 111. H. P. C. 159. 2 Hawk. P. C. c. 5. § 16. (c) The king can grant but one patent of association to one commission. 2 Hawk. P. C. c. 5. § 16. And Q. Whether a commission of

association, relating only to a special cause, can associate the persons named in it to those appointed by a general commission. 2 Hawk. P. C. ubi supra.

Upon the death of such commissioners, after an indictment taken before them, and process thereupon, a new commission may authorize others to proceed, and a writ shall go to the executors of the first commissioners, to send the records and processes before the new ones.

Reg. 123. F. N. B. 111. 2 Hawk. P. C. c. 5. § 17.

After

Reg. 124.
F. N. B.
111.
2 Hawk.
P. C. c. 5.
§ 18.

After a writ of association, it is usual to make out a writ of *fi non omnes*, which authorizes such a number of the justices appointed by the former commissions to proceed, if all of them cannot conveniently be present.

But for
these *vide*
2 Hawk.
P. C. c. 5.
§ 22., &c.

There are several ancient precedents of special commissions of *oyer and terminer*, as those for inquiring and determining some particular enormous violence done to the party who sues it out, &c.

2 Hawk.
P. C. c. 5.
§ 21., and
several au-
thorities
there cited.

As to the difference between a commission of *oyer and terminer* and gaol-delivery, it may be proper to observe, that where the same persons at the same time are both commissioners of *oyer* and also of gaol-delivery, they may proceed by virtue of the one commission, in such cases wherein they have no jurisdiction by the other, and execute both at the same time, and make up their records accordingly.

4 Inst. 163.
H. P. C.
162 [By
25 Geo. 3.
c. 18., and
32 Geo. 3.
c. 48., the
justices of
oyer and
terminer and
gaol delivery
of *Newgate*

These commissions may be suspended by the court of King's Bench sitting in the same county; but the jurisdiction of the justices is revived of course, when the said court no longer sits there: also, their authority may be suspended by a writ of *superfedeas*, which is grantable on proof that their commission was unduly granted; in which case their power may be restored by a writ of *procedendo*; but a commission once (a) determined cannot be revived, nor can the justices be authorized a-new without another commission.

for the county of *Middlesex*, and the justices of the peace for that county, are empowered to continue and proceed in a session of gaol delivery, of the peace, and of *oyer and terminer*, notwithstanding the happening of the efflag day of term, or the sitting of the court of King's Bench at *Westminster*, or elsewhere in the county of *Middlesex*.] (a) That such commission may be determined expressly or impliedly, and for the several ways it may be done, *vide* 2 Hawk. P. C. c. 5. § 4., &c.

(B) Of their Jurisdiction when appointed.

H. P. C.
158
4 Inst. 164.
Bro. Coron.
170.
12 Co. 32.

JUSTICES of gaol-delivery may, by the (b) common law, proceed on any indictment of felony or trespass, found before any (c) other justices, against any person in the gaol, mentioned in their commission, and not determined.

(b) And by 4 E. 3. c. 2. the justices assigned to deliver gaols shall have power to deliver the same gaols of those that shall be indicted before the justices of the peace. (c) But justices of *oyer and terminer* have regularly no such power. 2 Hawk. P. C. c. 5. § 32.

Cro. Eliz.
90. 179.
And. 111.

It seems the better opinion, that justices of gaol-delivery may take indictments against any persons within their commission.

2 Hawk. P. C. c. 6. § 2. H. P. C. 158. 4 Inst. 168.

Vide 2 Hawk.
P. C. c. 6.
§ 4.

Also, that they may, by virtue of a general commission, deliver the gaol of persons committed for treason.

Vide 2
Hawk.
P. C. c. 6.
§ 5.

But justices of gaol-delivery have no power to proceed against any, except those who are in actual custody; and therefore they have no more to do with one let to mainprize, than if he were at large.

Justices of gaol-delivery have not only power to discharge prisoners acquitted before them on a trial, but also (a) all such against whom, on proclamation, no evidence shall appear to indict them: Also, justices of gaol-delivery may award execution against prisoners outlawed for felony before justices of peace; and though their commission be in strictness determined after the end of their session, yet may they, after their session, order the reprieve or execution of the persons condemned before them.

do. 2 Hawk. P.

2 Hawk. P. C. c. 6. § 6. 8. (a) Which neither justices of the peace, nor justices of oyer and terminer can C. c. 5. § 6.

By the 4 E. 3. cap. 2. it is enacted, "That justices assigned to deliver gaols shall have power to inquire of those in whose ward persons indicted before wardens of the peace shall be, if they make deliverance, or let to mainprize any so indicted which be not mainpernable, and to punish them if they do any thing against this act."

That by the common law they may punish those who unduly bail prisoners.

By the 1 & 2 Ph. & M. "If any justice of peace of the *quorum*, or coroner, shall offend against that statute, either as to bailing prisoners or taking their examinations, or the information of those that bring them before them, or not putting the same in writing, or not certifying them to the next gaol-delivery, or not putting in writing the evidence to a jury on a coroner's inquest of murder or manslaughter, or not binding over material witnesses, or not certifying such evidence and such recognizances, the justices of gaol-delivery shall, on due proof by examination, set such fine for every such offence as shall seem meet."

2 Hawk. P. C. c. 5. § 9. 6.

By the 4 E. 3. cap. 5. "Justices of gaol-delivery shall punish sheriffs and gaolers refusing to take felons into their custody from constables and townships, without being paid for such receipt."

By the 1 E. 6. cap. 7. "Where any persons shall be found guilty of treason or felony, for which judgment of death may ensue, and shall be reprieved to prison (b) without judgment at that time, those persons who shall at any (c) time after be assigned justices (d) to deliver the gaol where such persons shall remain, shall have authority to give judgment of death against such persons, as the same justices before whom they were found guilty might have done, if their commission of gaol-delivery had continued."

(b) But such subsequent justices have no power to award the execution of persons condemned by former justices, and reprieved by them.

Dalf. 20. Dyer, 165. 2 Hawk. P. C. c. 6. § 19. (c) Extends to subsequent commissioners authorized by a successor, as well as to those authorized by the same king. 7 Co. 31. Dalf. 20. (d) Extends not to justices of oyer and terminer. 12 Co. 33. [See 3 G. 3. c. 15. *infra*. vol. 3. 141.]

(C) Of the Form of their Proceedings and holding their Courts.

IF a commission of oyer and terminer be awarded to certain persons to inquire, &c. at such a place, they can neither open it at another, nor (e) adjourn it thither, nor give judgment there; and if they do, their proceedings will be *coram non iudice*; yet

2 Hawk. P. C. c. 5. § 14., and several authorities

justices

there cited. justices appointed *pro hac vice* may adjourn from one day to another, though their commission have no words to that purpose. (c) That it is most proper to enter their adjournments in the *present tense*; but by the multitude of precedents the entry of them in the *preter tense* is good. Raym. 115. 2 Hawk. P. C. c. 5. § 15. But an adjournment, of which no entry appears, shall not be intended to have been made. Sid. 348. 2 Keb. 284. 292.

By the 9 E. 3. cap. 5. "Justices of assize, gaol-delivery, and of oyer, shall send their records and processes determined and put in execution, to the Exchequer at Michaelmas every year; and the treasurer and chamberlains for the time being, having the sight of the commissions of such justices, shall receive the same records and processes of the said justices under their seals, and keep them in the treasury as the manner is; so that the justices first take out the estreats of the said records and processes, to send to the Exchequer, as they were wont before."

By the 6 R. 2. cap. 9. "Justices assigned to take assizes, and deliver gaols, shall hold their sessions in the principal towns of the counties where the shire courts were then holden, or after should be holden."

[By st. 19 Geo. 3. c. 74. § 70. "Whenever the courts of assize, nisi prius, oyer and terminer, or gaol-delivery, for any county at large in England, shall be holden in or near any city or town that is also a county of itself, and at the same time with the like or any of the like courts for the said city or town, the lodgings of the judge or judges shall be construed and taken to be situate both within the county at large, and also within the county of such city or town, for the purpose of carrying this act into execution, and of transacting the business of the assizes for such county at large, and for the county of such city or town, during the time that such judge or judges shall continue therein for the execution of their several commissions."]

Of the Court of the Justices of Assize and Nisi Prius.

4 Inst. 158. JUSTICES of (a) assize derive their authority from the commission, by which they are empowered to inquire of all disseisins, and to restore such, as have been disseised of their lands or tenements, to the possession of them, by trial at one assizes. Crompt. Jur. 204. (a) Are so called from the writ of assize; but for this *vide* tit. Assize, and 4 Inst. 158. Co. Lit. 153.

To these, by writ of *nisi prius*, directed to the judges or commissioners of assize, and clerk of assize, is annexed an authority and jurisdiction of trying such issues as are joined in the courts at *Westminster*, in their proper counties; and this method was introduced after the laying aside of the justices itinerant, and was contrived for the ease of the subject, that the jury and witnesses might not be obliged to come out of their proper counties.

The manner of contriving it was, to direct the *venire, distringas*, or *habeas corpora juratorum*, to return the jury at some day the next term, unless the justices *prius tali die & loco venerint*; there were no issues returned on the *venire* to make them appear at *nisi prius*; yet it was so much a greater difficulty to them to appear afterwards at *Westminster*, which if they did not, the *distringas* issued, that it had its effect to convene them in their proper counties; the writ was contrived to command them to come into court, because it would have been improper for the court to have commanded them to come into any other place; so that their appearance before the justices of assize, is an excuse for their non-appearance in *Bank*; but if they did not appear at the assize, nor at *Westminster*, then issued a *habeas corpus* and *distringas* to bring them up.

The day at *nisi prius* and in *Bank* are in consideration of law the same, because the writ of *nisi prius* which gives authority to the judge to try the cause in the county, is instead of the court; and therefore the *posse* certified by him on the day of *Bank* is the same as if the jury had come up to the court, and the trial had been had in open court.

The justices have large jurisdiction, by several statutes, as to all criminal matters, and may punish offences in sheriffs, gaolers, and other officers, &c. which see in 2 *Hawk. P. C. c. 7.*

Of the Court of Sessions of Justices of the Peace.

A COURT of sessions of justices of peace is (a) an assembly of two or more, whereof one is of the *quorum*, at a day and place before appointed by them, in order to inquire of, hear, and determine matters within their jurisdiction.

Lamb. Book
4. c. 2.
Vide tit.
Justices of
the Peace.

(a) Pursuant

to the statute 34 E. 3. c. 1. by which it is enacted, that two or three of the best reputation in the counties shall be assigned keepers of the peace by the king's commission, and at what time need shall be, the same with other wise and learned in the law shall be assigned by the king's commission, to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably, according to law and reason, and the manner of the deed.

Any

Lamb. B. 4. c. 20. Any justices, whereof one is of the *quorum*, may direct their
 (a) That such precept can only be suppressed by writ out of Chancery. Lamb. B. 4. c. 2. (a) precept under their *teste* to the sheriff, for the (b) summons of such a sessions, thereby commanding him to return a grand jury, and to warn all (c) stewards, constables, and bailiffs of liberties, to be present before them or their fellow justices, at such a day and place, and also to attend there himself, and to proclaim in proper places that such sessions will be holden.

Crompt. Jurif. 122. (b) That a sessions may be holden without any summons, as to proceedings on indictments, or on other particular occasions which need no attendance of grand jurors or officers. Lamb. Book 4. c. 2. 2 Hawk. P. C. c. 8. § 52. c. Burn. 191. (c) Who are all obliged to attend, on pain of being amerced at the discretion of the justices. 2 Hawk. P. C. c. 8. § 52. As is the keeper of the house of correction, *vide* 7 Jac. 1. c. 4.

Lamb. B. 4. c. 3. Justices of the peace, in their sessions, have no jurisdiction one over the other, according to that rule *inter pares non est potestas*; therefore, they cannot amerce a justice for his non-attendance, 2 Hawk. P. C. c. 8. § 57. nor bind a brother justice to his good behaviour for using such expressions (d) in court, for which, if he were a private person, he might be committed, or bound to his good behaviour. (d) But in other instances, any justice of peace may require his fellow to find sureties of the peace; for matters of this kind require an immediate remedy. 2 Hawk. P. C. *ubi supra*.

Lamb. B. 4. c. 19, 20. Sessions holden for the general execution of the authority of justices of peace, and which are usually holden in the four quarters of the year, are called general sessions; and a sessions holden on a special occasion, for the execution of some particular branch of the authority of justices of peace, is called a special sessions. 2 Salk. 474. pl. 11. 2 Hawk. P. C. c. 8. § 58.

(e) 2 Leach's Hawk. P. C. c. 8. § 58. [When the justices are once legally convened, they cannot adjourn any matter depending before them, without expressly adjourning the sessions also (e); which adjournment must shew when the original sessions commenced (f). There is indeed no necessity to set out all the particular adjournments (g); though when a warrant is issued for taking any one, it must be shewn that the sessions continued by adjournment till the taking (h).] m. Ca. temp. Hardw. 80. (f) 2 Str. 832. 865. (g) Andr. 105. (h) 2 Lev. 229.

(i) 4 Burn. Just. 184. They cannot refer any subject of their inquiry to the determination of the judges of assize, without the consent of the parties (i); for they are bound to make a final judgment themselves (k). (k) Ca. temp. Hardw. 81.

(l) Ca. temp. Hardw. 79. When they proceed upon indictments, as a court of record at common law, their proceedings must contain the formal and regular continuances (l); for the sessions once dropped cannot be resumed (m). (m) 2 Str. 1263.

2 Salk. 606. The sessions being considered as one day, the justices may alter their judgments during the continuance of it.

1 Burr. 245. Upon appeals their discretion is co-extensive with that of the two justices, and they need not give the reason upon which their opinion is founded. 2 Salk. 477.

(n) Cowp. 367. The sessions may proceed by information on 5 Eliz. for exercising a trade, (n) &c. But they cannot make an original order for late overseers to pay over monies to their successors (o); nor can they make (o) 3 Burr. 1366.

make a new scavenger's rate (*a*), or set aside an assignment of an apprentice bound out by the justices (*b*), nor have they cognizance over the bailiff of a corporation for not qualifying (*c*).]

(*a*) *Id.* 1460.

(*b*) 1 Str.

40.

(*c*) Say, Rep. 138.

Of the Ecclesiastical Courts.

THE church, before the conversion of *Constantine*, was a distinct and independent society from the state, and, as such, it was necessary they should have rules and orders among themselves; for the better government of the body of christians, the power of judicature was placed in the bishops, who had by their wisdom and gravity obtained an authority in the church, and who used to send abroad their ministers to propagate the gospel in their several precincts; and therefore they determined all controversies among them, which could not be carried into a heathen court without great scandal to the quiet and peaceable way of living which was the glory of the primitive christians; and this they founded on the direction of *St. Paul* himself, *Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?* After the conversion of the emperors, their zeal for christianity made them allow the bishops the same jurisdiction; but then those bishops, in their sentences, followed the laws of their country: but, when the pope afterwards pretended to infallibility, he would no more conform his decrees to the laws of particular states and kingdoms; and, therefore, those states were under a necessity of exerting their original right and power of judicature: Hence it is truly said, that (*d*) the spiritual jurisdiction, within these kingdoms, is derived from the king, and that such jurisdiction when exceeded, is subject to the controul of the king's temporal courts.

Godolph. Repert.

Canonic.

129 to 1334

5 Co. 1.

Cawdry's case.

(*d*) *Roll.*

Abr. 361.

Day. 97.

But, for the better understanding the jurisdiction allowed the spiritual court at this day, we shall consider,

(A) The several Ecclesiastical Courts which exercise a Jurisdiction: And herein,

1. Of the Court of Convocation.
2. Of the Court of Arches.
3. Of the Prerogative Court.
4. Of the Court of Audience,

5. Of the Court of Faculties.
6. Of the Court of Peculiars.
7. Of the Consistory Courts.
8. Of the Court of the Archdeacon.
9. Of the Court of Delegates.
10. Of the Court of Commissioners of Review.

(B) Of appealing from an inferior to a superior Court.

(C) Of citing one out of his own Diocese: And herein of the Boundaries of their Jurisdiction.

(D) In what Cases the Ecclesiastical Courts are allowed to have a Jurisdiction.

(E) How they are to proceed as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

(A) The several Courts which exercise a Jurisdiction: And herein,

1. Of the Court of Convocation.

(a) That they were always assembled by the king's writ, vide 4 Inst. 323. Godolph.

THE *convocation* is commonly called a national synod, convened by the king's (a) writ, directed to the archbishops of *Canterbury* and *York*, requiring them to summon every bishop, dean, and archdeacon, a proctor for the chapter, and two proctors for the clergy of each diocese in the province of (b) *Canterbury*; but in *York*, two proctors for each archdeaconry.

Repert. 99. and the 25 H. 8. c. 19. the act of submission of the clergy, by which it is expressly declared, that they can only assemble by virtue of the king's writ, &c. (b) The Provincial Synod of *Canterbury* consists of twenty-two bishops, twenty-two deans, twenty-four prebendaries, fifty-four archdeacons, and forty-four clerks, representing the diocesan clergy. Godolph. Repert. 98. — The archbishop of *York*, at the same time and in like manner, holds a convocation of all his province, constantly corresponding, debating and concluding the same matters with the Provincial Synod of *Canterbury*. Godolph. Repert. 98.

4 Inst. 322. This assembly are to meet at the time and place appointed by the king's writ, and constitute an ecclesiastical parliament, the archbishop and his suffragans as his peers sitting together, and composing one house, called the upper house of convocation; the deans, archdeacons, a proctor for the chapter, and two proctors for the clergy, the lower house; in which they chuse a prolocutor in the nature of a speaker of the house of commons.

Their

Their jurisdiction is in matters of (a) heresy, schisms, and other mere spiritual and ecclesiastical causes; but they cannot meddle with any matters relating to the laws of the land, or the king's crown or dignity; and in those in which they have a jurisdiction they are to proceed *juxta legem divinam & canones sanctę ecclesię*.

whether at this day they have power to convene the heretick, *Q. & vide* 2 Roll. Abr. 226. Hawk. P. C. c. 2. § 3.

4 Inst. 322. (a) That the convocation may declare what opinions are heretical; but

Also, by 25 H. 8. cap. 19. it was enacted, that no canons, constitution, or ordinance, should be made or put in execution within this realm by authority of the convocation of the clergy, which were contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm: and by this act the court of convocation, as to the making of new canons, is to have the king's licence, as also his royal assent for putting the same in execution, with this proviso, that such canons as were made before that act, which be not contrariant nor repugnant to the king's prerogative, the laws, statutes, or customs of the realm, should be still used and executed, as they were before the making of the act.

Vide 4 Inst. 323. That it is statute is only declaratory of the common law, *& vide* Co. 72. 2 Roll. Abr. 226. Moor, 783. Vaugh. 327. 2 ed. 44. 2 Salk. 412. pl 2.

“By 8 H. 6. cap. 1. the clerks of the convocation, their servants, “and families, shall have such privilege in coming, tarrying, and “going, as the commons called to parliament.”

2. Of the Court of Arches.

The archbishop of *Canterbury* hath a peculiar jurisdiction in 13 parishes within *London*, which are (b) exempt from the jurisdiction of the bishop of *London*; the chief of these is *Bow*; and, as this court was antiently held in the church of *Bow*, it was called the court of arches from the fashion of the pillars of the steeple bent *arch-wise*.

4 Inst. 337. (b) That by agreement, the archbishop of *Canterbury* and bishop of *London*

remit their courts to each other, so that for matters arising within the diocese of *London*, the suit may be either in the Arches or in the Consistory Court of *London*. Cro. Car. 339. 456. But whether such composition be good, and out of the statute 23 H. 8. c. 19. which prohibits the citing a person out of his own diocese, *vide* 13 Co. 4. Raym. 3. Sid. 65. 178. Lev. 225. Keb. 597.

The jurisdiction of this court extends not only to ecclesiastical causes arising within these 13 parishes, of which it may take cognisance in the first instance, but also by way of appeal may examine, affirm, or reverse the sentences and decrees of all inferior ecclesiastical courts within the province of *Canterbury*.

4 Inst. 337. 13 Co. 4. &c. Godolph. Repert. 100. Dyer, 241.

3. Of the Prerogative Court.

In this court all testaments are to be proved, and all administrations granted, where the party dying within the province of the archbishop of *Canterbury* hath *bona notabilia* in some other diocese than where he died, which regularly is to be to the value of 5*l.* but in the diocese of *London* it is 10*l.* By composition the archbishop of *York* hath the like court.

4 Inst. 333. *Vide* head of Executors and Administrators.

- 4 Inst. 335. The *probate* of every bishop's testament, or granting of administration of his goods, although he hath not goods but within his own jurisdiction; doth belong to the archbishop.

4. Of the Court of Audience.

- 4 Inst. 337. This court is kept by the archbishop in his palace, in which are transacted matters of form only, as confirmations of bishops, elections, consecrations, the granting of the guardianship of the spiritualties, *sede vacante* of bishops, admissions and institutions to benefices, dispensing with banns of matrimony, and such like. For the original institution of this court, and that it meddles not with contentious matters, *vide* Godolph. Repert. 106.

5. Of the Court of Faculties.

- 4 Inst. 337. This is a court which belongeth to the archbishop, in which his officer, called *magister ad facultates*, grants dispensations, as to (a) marry, to eat flesh on days prohibited, to ordain a deacon under age, that the son may succeed the father in a benefice, that one may have two or more benefices incompatible, &c. (a) That every diocesan may do the same.
- 4 Inst. 337. This authority was raised and given to the archbishop of *Canterbury* by the statute of 25 H. 8. cap. 21. whereby authority is given to the said archbishop and his successors, to grant dispensations, faculties, &c. by himself, or his sufficient and substantial commissary or deputy, for any such matter whereof heretofore such dispensations, faculties, &c. then had been accustomed to be had at the see of *Rome*, or by authority thereof.
- 4 Inst. 337. [A faculty may be subscribed, registered, and enrolled by the deputy of the chief clerk of the faculty.]
Rex v. Episc. Cestr. 8 Mod. 364.]

6. Of the Court of Peculiars.

- 4 Inst. 338. These courts, which exercise an ecclesiastical jurisdiction, and are exempt from and not subject to the controul of the ordinary of the diocese, are called peculiars, and must be either regal, (b) archiepiscopal, episcopal, or archidiaconal; and in every one of these the owner has (c) a power of common right to grant administration, &c. on supposition of an original composition between him and the ordinary of the diocese for that purpose.
- Godolph. Repert. 119. (b) Within the province of the Archbishop of Canterbury there are 57 peculiars, all which belong to the archbishop. (c) Salk. 40. pl. 10. 41. 6 Mod. 241.

[As the persons, entitled to peculiar jurisdiction, have no known or certain registers, or publick place to keep their records in, and wills are therefore liable to be lost: they are ordered by canon 126, once in every year, upon pain of being suspended from the exercise of their jurisdiction, to exhibit into the publick registry of the bishop of the diocese, or of the dean and chapter, under whose jurisdiction the peculiars are, every original testament of every person in that time deceased, and by them proved, or a true copy of every such testament, examined, subscribed, and sealed by the peculiar judge and his notary.]

If a peculiar be subordinate to the bishop, the cause must be referred to the immediate ordinary, as in the case of an archdeacon (a) or commissary, and not to the archbishop, unless the peculiar have his immediate resort to the archbishop.

Hob. 186.
(a) The peculiar jurisdiction of an archdeacon is not

properly a peculiar, but rather a subordinate jurisdiction. *Per* Holt, C. J. 6 Mod. 308. 2 Roll. Rep. 446-8.

But if the peculiar be free by a general exemption from all ordinary jurisdiction (which was common in the case of monasteries both by the grants of kings and popes) then the cause must be remitted to the king, as appeals must also be in such cases; and so it is provided by stat. 25 H. 8. c. 21.]

Hob. 186.
A peculiar *prima facie* is to be understood of him who hath co-

ordinate jurisdiction with the bishop. *Per* Holt, C. J. 6 Mod. 308. Where one dies possessed of goods in several peculiars within the same diocese, administration shall not be granted by the bishop of the diocese, but by the metropolitan; inasmuch as they are exempt from ordinary jurisdiction. Gibf. 472. Swinb. 2. 410.

7. Of the Consistory Courts.

The consistory court of each archbishop, and every bishop of every diocese within this realm, is holden before the bishop's chancellor in the cathedral church; or before his commissary, in places of his diocese, far remote and distant from the bishop's consistory so as the chancellor cannot call them to consistory with any conveniency, or without great travel and vexation, for which reason such commissary is called *commissarius foraneus*.

4 Inst. 338.
Godolph.
Reperit. 83.

8. Of the Court of the Archdeacon.

This court is holden by the archdeacon, in such places as the archdeacon, either by prescription or composition, hath jurisdiction in spiritual causes within his archdeaconry; he is called *oculus episcopi*, and exercises an ecclesiastical jurisdiction, either concurrently with the bishop, or exclusively.

4 Inst. 339.
Godolph.
Reperit. 60.
&c.

9. Of the Court of Delegates.

This court is erected by virtue of the king's commission, which issues out of Chancery upon an appeal or petition (b) directed to him, complaining of some grievance or injury the party has suffered by the sentence or proceedings of the ecclesiastical court.

4 Inst. 339.
[(b) Such a commission may be granted at the instance
1 Ark. 293.]

of a person interested, though not an original party in the cause. *Jones v. Bougett*,

On such appeal, the king appoints (c) commissioners called (d) delegates, who are to hear the grievances complained of, and who by force of such delegation have power (e) to reverse or affirm the sentence of the inferior court; and this the king, as is said, may do by virtue of an original jurisdiction, which was always inherent in the crown.

(c) These commissioners may be as well laymen as ecclesiastics, Comp. Incumb. 57. cumo. 56.

But by Gibson's Codex, 1082. they were formerly only ecclesiastics. (d) The commission being drawn by the clerks in Chancery, who were usually civilians; or by the chancellor, who was usually a canon; they obtained the name of delegates, being a name peculiar to that profession. Comp. Incumb. 57. (e) They have power only to affirm or reverse, but have no jurisdiction in the first instance, as to grant administration, &c. Latch. 85.

And by 25 H. 8. *cap.* 19. *for restraining appeals to Rome*, it is enacted, "That for lack of justice, at or in any courts of the archbishops of this realm, or in any of the king's dominions, it shall be lawful to the party grieved to appeal to the king's majesty in the king's court of Chancery, and that upon every such appeal a commission shall be directed under the great seal to such persons as shall be named by the king's highness, his heirs or successors, like as in cases of appeal from the admiral's court, to hear and definitely determine such appeals and the causes concerning the same, which commissioners, so by the king's highness, his heirs and successors, to be named or appointed, shall have full power and authority to hear and determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence, as the said commissioners shall make and decree in and upon any such appeal, shall be good and effectual, and also definitive, and no further appeals to be had or made from the said commissioners for the same."

4 Inst. 240.
Moor, 782.

No appeal lies to them from a local visitor, nor in any case of a temporal nature, nor did it lie from the high commission court, when in being, because they themselves were only delegates acting by immediate commission from the king.

Vent. 133
2 Lev. 6.
S. C.

A suit commenced before the delegates does not abate by the death of either of the parties.

2 Keb. 768. 778. S. C. Hetley, 107. Cro. Jac. 433. Leon. 277-8.

Moor, 462-3.
Larch.
85, 86. 229.

If the delegates exceed their authority, or proceed in matters not properly within their consuance, they may be prohibited by the king's temporal courts.

10. Of the Court of Commissioners of Review.

Put for this,
vide 4 Inst.
321. Moor,
463. 781.
Lyer, 273.
11. Rep.
232.

After a sentence by the delegates the king may grant a commission of review, and such commissioners may reverse the sentence of the delegates; for the king's power is not restrained by the statute 25 H. 8. *cap.* 19. *supra*, which says, that such sentence shall be definitive; also the pope after a definitive sentence by the canon law used to grant a commission *ad revidendum*, and such authority as the pope had, claiming as supreme head, doth of right belong to the crown, and is annexed thereto by the statutes of 26 H. 8. *cap.* 1. 1 Eliz. *cap.* 1.

(B) Of appealing from an inferior to a superior Court.

4 Inst. 340.

EVERY subject has a right to appeal, and every superior court, enabled by law to hear and determine such appeal, is obliged to receive the same, and after such appeal duly made, the inferior court is tied up from proceeding any farther in the cause.

" By

“ By 24 *H. 8. cap. 12.* from the archdeacon's court the appeal is to the bishop of the diocese; but when the cause is commenced before an archdeacon, or any archbishop or his commissary, the appeal must be to the court of arches.

“ And by the said statute, from the bishop of the diocese, his chancellor or commissary, the appeal is to the archbishop of either province respectively.

“ By 25 *H. 8. cap. 19.* the appeal from the prerogative court is to the king in Chancery, who appoints delegates by commission to hear and determine the appeal.”

And it seems by the said statute that an appeal from the arches is to be to the (a) king in Chancery. (a) But by 24 *H. 8. c. 12.*, such

appeal is to be to the archbishop; and so is 4 *Inst. 341.* But *vide* *Carth. 169.* That an appeal does not lie from the dean of the arches to the archbishop as visitor, because they are one and the same; at least it would be but appealing from the deputy to the principal.

“ Also, by 25 *H. 8. cap. 19.* appeals from the court of peculiars, or places exempt, which were before to the see of Rome, shall be henceforth into the Chancery, and shall be there determined before commissioners of delegates under the great seal, &c.”

If the matter concerns the king, the appeal must be to the higher house of convocation of that province. 4 *Inst. 339, 340.*

“ By 24 *H. 8. cap. 12.* and 25 *H. 8. cap. 19.* all appeals from a definitive sentence must be within 15 days. 4 *Inst. 339.*

“ By 25 *H. 8. cap. 19.* there shall be no appeal to the see of Rome, under pain of a *præmunire*.” 4 *Inst. 340. Vide title Præmunire.*

(C) Of citing one out of his own Diocese: And herein of the Boundaries of their Jurisdiction.

BY 23 *H. 8. cap. 9.* it is enacted, “That no manner of person shall be from henceforth cited, or summoned, or otherwise called to appear by himself, or herself, or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese or peculiar jurisdiction, where the person which shall be cited, summoned, or otherwise (as is aforesaid) called, shall be inhabiting and dwelling at the time of awarding or going forth of the same citation or summons, except that it shall be for, in, or upon any of the cases or causes hereafter written, that is to say, for any spiritual offence or cause, committed or done, or omitted, followed, or neglected to be done, contrary to right or duty by the bishop, archdeacon, commissary, official, or other person, having spiritual jurisdiction, or being a spiritual judge, or by any other person or persons within the diocese, or other jurisdiction whereunto he or she shall be cited, or otherwise lawfully called to appear and answer; and except also it shall be by or upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself or herself grieved or wronged by the ordinary,

“ judge, or judges of the diocese or jurisdiction, or by any of his
 “ substitutes, officers, or ministers, after the matter or cause there
 “ first commenced, or begun to be shewed unto the archbishop or
 “ bishop, or any other having peculiar jurisdiction, within whose
 “ province the diocese or place peculiar is; or in case that the
 “ bishop, or other immediate judge or ordinary, dare not, nor will
 “ not convene the party to be sued before him; or in case that
 “ the bishop of the diocese, or the judge of the place, within
 “ whose jurisdiction, or before whom, the suit by this act shall
 “ be commenced and prosecuted, be party directly or indirectly
 “ to the matter or cause of the same suit; or in case that any
 “ bishop or any inferior judge, having under him jurisdiction in
 “ his own right and title, or by commission make request or in-
 “ stance to the archbishop, bishop, or other superior ordinary or
 “ judge, to take, treat, examine, or determine the matter before
 “ him or his substitutes; and that to be done in cases only where
 “ the law civil, or canon, doth affirm execution of such request
 “ or instance of jurisdiction to be lawful or tolerable; upon pain
 “ of forfeiture to every person, by any ordinary, commissary, of-
 “ ficial, or substitute, by virtue of his office, or at the suit of any
 “ person, to be cited or otherwise summoned or called, contrary
 “ to this act, of double damages and costs, for the vexation in
 “ that behalf sustained, to be recovered against any such ordinary,
 “ commissary, archdeacon, official, or other judge, as shall award
 “ or make process, or otherwise attempt or procure to do any
 “ thing contrary to this act, by action of debt or action upon the
 “ case, according to the course of the common law of this realm
 “ in any of the king’s high courts, or in any other competent
 “ temporal court of record, by original writ of debt, bill, or plaint,
 “ in which, &c., and upon pain of forfeiture for every person so
 “ summoned, cited, or otherwise called, (as is abovesaid) to an-
 “ swer before any spiritual judge out of the diocese, or other jurif-
 “ diction, where the said person so dwelleth, or is resident, or
 “ abiding, 10*l.* the one half thereof to be to the king; and the
 “ other half to any person that will sue for the same in any of
 “ the king’s said courts.

“ Provided, that it shall be lawful to every archbishop of this
 “ realm to call, cite, and summon any person or persons inhabit-
 “ ing or dwelling in any bishop’s diocese within his province for
 “ causes of heresy, if the bishop or other ordinary immediate
 “ thereunto consent, or if that the same bishop, or other imme-
 “ diate ordinary or judge, do not his duty in punishment of the
 “ same.

“ Provided also, that this act shall not extend in any wise to the
 “ prerogative of the most reverend father in God the archbishop
 “ of *Canterbury*, or any of his successors, of or for calling any
 “ person or persons out of the diocese where he or they be inha-
 “ biting, dwelling, or resident, for (a) probate of any testament
 “ or testaments, any thing in this act contained to the contrary.

“ Provided also, that this act be not any way hurtful or preju-
 “ dicial to the archbishop of *York*, nor to his successors, of, for, or
 “ concern-

(a) Godb.
 214. Ex-
 tends only
 to the pro-
 bate of wills.

" concerning the probate of testaments within his province and jurisdiction, by reason of any prerogative; any thing in this act to the contrary notwithstanding."

In the construction of this statute the following opinions have been holden, that the archbishop of *Canterbury* cannot cite a person for substra^ction of tithes living in *Essex* into the court of arches holden in *London*, although *Essex* be within the diocese of *London*, and that this statute, like all other acts of parliament, shall be expounded by the judges of the common law, although they relate to spiritual persons and affairs, and that wherever an act of parliament prohibits the doing of a thing, any court acting contrary may be restrained by prohibition. 13 Co. 4, 5, &c.

If a person inhabiting within one diocese doth substra^ct and with-hold his tithes within another diocese, a suit may be commenced and prosecuted in the court of the bishop, in whose diocese the tithes are so substra^cted, and the party so substra^cting his tithes may be there cited and summoned, although inhabiting within another diocese. Lev. 96. & Godb. 191. 2 Brownl. 12. 27. Hard. 4th. Winch. Ent. 570. a. Cro. Car.

97. Roll. Rep. 323. Corth. 476. Machin and Moulton, S. P. adjudged, for diocese signifies jurisdiction, and it is the locality of the lands which gives jurisdiction, although the maxim in the civil law is *forum sequitur rem*. 5 Mod. 450. S. C. 2 Saik. 549. pl. 9. S. C.

So, a suit for a legacy may be in the diocese where the will is proved, although the defendant lives in another diocese, and the citing of him out of such diocese is not within the statute. Vent. 233. 3 Keb. 619. Cro. Car. 97. Like point. Salk. 104. pl. 1.

So, where *A.*, and others, who lived in the diocese of *Litchfield* and *Coventry*, but occupied lands in the diocese of *Peterborough*, were taxed in the parish where they occupied lands for the new casting of the bells of the church; and, upon refusal to pay, a suit was commenced against them in the diocese of *Peterborough*; it was holden, that occupying lands made them inhabitants, and that the citing of them into the diocese where the lands lay, and in respect to which they were chargeable, was not within the statute; also, that bells were more than a mere ornament, which the inhabitants were bound to repair. 3 Mod. 211. S. C. And there said, that a prohibition was granted, because but a personal charge, and not like the repairing of the church, which is a real charge upon the land, let the owner live where he will.

My Lord *Coke* says, that by this statute the archbishop is reduced to a proper diocese, or peculiar jurisdiction, unless it be in five cases; as 1st, In default of the ordinary. 2^{dly}, In case of appeal. 3^{dly}, Or in case the ordinary dares not, or will not, convene the party. 4^{thly}, Or if the ordinary be party to the suit below. 5^{thly}, In case (a) of instance and request by the ordinary. 13 Co. 4. Porter and Rochester's case. (a) On suggestion that the party is sued out of the diocese, the court grants a prohibition; but if it appears upon proof that it was upon request to the archbishop, according to the exception, the prohibition will be stayed. 5 Mod 71. Godb. 244. Latch. 180.—The party in alleging such request need not shew the matter *speciely*, that it might appear to have been of a spiritual nature, nor that the request was under seal. Cro. Car. 162.—The request may be from a peculiar to the ordinary of the diocese Cro. Car. 162.—But whether from a peculiar court, or from the archdeacon's court immediately to the archbishop, *vide* Hob. 16. 186. Syd. 90. 5 Mod. 233, 239.

The party who is cited out of his diocese must move for a prohibition before sentence, for by litigating the matter in that court he submits to the jurisdiction. 12 Co. 76. Hett. 19. Cro. Car. 97.

But

Carth. 34.
35.

But if upon the face of the libel it appears that the party is an inhabitant at a place out of the diocese, there the libel is *felo de se*, and in such case the sentence makes no alteration.

Carth. 34.

Yet in a case where *A.*, in the libel was named of *D.*, in *Hampshire*, which is known to be within the diocese of *Winchester*, was cited into the diocese of *London*, though affidavits were offered of that matter, yet being after sentence, the court held, that they could not take any notice within what diocese *D.* in *Hampshire* was, for they could not *ex officio* take notice of the limits of bishopricks, but they should not take it to be within the proper diocese.

2 Roll.

Abt. 291.
Several cases
to this pur-
pose.

The boundaries of all jurisdictions shall be determined in the king's temporal courts; so, if the question be, whether in such a place there be a peculiar jurisdiction exempt from the ordinary, this shall be determined by the king's temporal courts; for it would be unreasonable that the archbishop, or bishop, should be judge in his own cause, and if they take upon them to determine any of those matters, a prohibition will be granted.

(D) In what Cases the Ecclesiastical Courts are allowed to have Jurisdiction.

THE statute 13 *E. 1.* called the statute of *circumspecte agatis*, and 9 *E. 2.* called *articuli cleri*, are the most antient, as well as the principal statutes, which declare in what cases the ecclesiastical courts shall have jurisdiction.

(a) The Bishop of Norwich is only put for an example, for it extendeth to all the bishoprics within the realm.
2 Inst. 487.
(b) As heresy, schism, holy orders, and such like.
2 Inst. 488.
(c) As incest, solicitation of chastity.
2 Inst. 488.
(d) Must be intended by way of commutation of penance.
(e) This doth not extend to a private

The words of the first are, "The king to his judges sendeth greeting: use yourselves circumspectly in all matters concerning the Bishop of (a) *Norwich* and his clergy, not punishing them if they hold plea in court christian, of such things as be (b) merely spiritual, that is, to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and (c) such like, for the which, sometimes corporal penance, and sometimes (d) pecuniary is enjoined, especially if a freeman be convict of such things: also, if prelates do punish for leaving the church-yard unclosed, or for that the church is (e) uncovered, or not conveniently decked; in which cases none other penance can be enjoined but pecuniary. Item, If a parson demand of his parishioners oblations or (f) tithes due or accustomed, or if any parson do sue against another parson for tithes greater or smaller; so that the fourth part of the value of the benefice be not demanded. Item, If a parson demand mortuaries in places where a mortuary hath been used to be given. Item, If a prelate of a church, or patron, demand of a parson a pension due to him; all such demands are to be made in a spiritual court, and for laying (g) violent hands on a clerk; and in cause of defamation it hath been granted already, that it shall be tried in the spiritual court, when money is not demanded; but a thing done for punishment of sin, and likewise for breaking an oath, in all cases afore rehearsed, the

" spiritual

“ spiritual judge shall have power to take knowledge, notwithstanding the king’s prohibition.”

chapel which a man has to his

own use, nor to the chapel, which is to be repaired by the parson. 2 Inst. 489. (f) For this *vide* title *Tithes*. (g) The suit must be *pro salute anime*; and therefore, if the clerk sue in the court christian for damages for the battery, he incurs a *præmunire*, for the ecclesiastical judge ought to proceed only to correct the sin. 2 Inst. 492. — If a clerk be arrested by process of law, he cannot sue for this sue in the ecclesiastical court. 2 Inst. 492. — If a clergyman be only assaulted, no remedy is to be had in the spiritual court, but in the common law courts. Cro. Eliz. 753. Pryn’s case.

The statute *articuli cleri*, or 9 E. 2. enumerates several cases in which the spiritual courts shall have jurisdiction; particularly as to tithes, obventions, oblations, mortuaries, redemption of penance, violent laying of hands on clerks, defamation; in which cases the king’s prohibition shall be of no force. For the exposition of this statute, *vide* 2 Inst. 599 to 639.

Matters testamentary, as the granting probate of wills, granting of administration, &c. are of ecclesiastical (a) consueance, and in these they may proceed according to the ecclesiastical law, and their sentences shall be presumed just and agreeable to such law, though (b) contrary to the rule and reason of the common law. (a) Matters testamentary are within the jurisdiction of the spiritual courts by

the custom of England, and not by the ecclesiastical law. Lynwood, 174. *Verbo approbatus*, *vide* Salk. 37. — Antiently the probate of testaments was in the county courts. Law. Saxo. Saxon Laws, 111. Where the bishop and sheriff sat together. Wilkins, 78. Lamb. Saxon Laws, 64. William the Conqueror first separated the ecclesiastical from the civil jurisdiction; yet his charter does not mention matters testamentary, or the probate of wills, to be of ecclesiastical consueance, but only says, that the crimes that were to be prosecuted *pro salute anime* were to be of that consueance. Selden Eadm. 167. But afterwards the ecclesiastical courts obtained a jurisdiction herein, the clergy having persuaded the people that every disposition of the testator was gratuitous and charitable, and to be disposed of by the executor, for the good of the soul of the party deceased. Selden Eadm. 168. 9 Co. 38. (b) 4 Co. 29. 7 Co. 47.

Although the spiritual court hath consueance of the probate of testaments, yet if (c) a court-baron hath had probate of wills time out of mind, and hath always continued that usage, every will within the precincts thereof must be proved there; and if the spiritual courts take upon them to grant the probate of any such will, a prohibition lies. 5 Co. 73. b. 2 Roll. Abr. 313. (c) So, by the custom of London, the government of

orphans, and effects of persons dying in London, belongs to the mayor and aldermen of London; and if any suit be commenced, or proceedings had in the ecclesiastical court, for any matter within such regulation, a prohibition lies. 5 Co. 734. 2 Inst. 249. 660. March, 107.

If the will is proved in the ecclesiastical court, that court has executed its authority, and the (d) executors must sue in the temporal courts to get in the estate of the deceased. 9 Co. 38. Henslow’s case.

administrator must sue for the goods of the intestate in the temporal courts, for the ecclesiastical courts cannot try the property of goods. 2 Roll. Abr. 287. Say and Harwood; and a prohibition granted for such a suit. (d) An administrator may begin in evidence that the seal was forged, or the will

As the ecclesiastical courts have now the probate of testaments, they, as incident to such jurisdiction, have power to determine all those matters that are necessary to the authenticating of every such testament; therefore, (e) if the seal of the ordinary appears, it cannot be suggested or given in (f) evidence in the common law courts, that the will was forged, or that the testator was *non compos*, or that another person was executor; for of these they had a proper jurisdiction, and the remedy must be by appeal. (e) Raym. 406, 407. 2 Roll. Abr. 299. Hard 131. (f) But it may be given in evidence that the seal was forged, or the will

repealed, or that there were *bona notabilia*, because that is not in contradiction to the real seal of the courts,

courts, but admits the seal and avoids it. Lev. 235, 236. Vaugh. 207. Show. 293. Salk. 36. pl. 7. Comb. 185. Skin. 299. pl. 2. Holt, 305. pl. 4. See 3 Vol. 34.

2 Roll. Abr. 291. 299. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inst. 608. Lynwood, 174. Sid. 161. Cro. Eliz. 88. 666. Richardson and Desborow adjudged [1 Ventr. 291. S. P. Shatter v. Friend, 1 Show. 158. 172. S. P. Comb. 160. S. C. Holt, 752. S. C. 2 Salk. 547. S. C.] 3 Mod. 283. S. C. 1 Raym. 220. S. C. cited. Carth. 142. S. C. adjudged.——But it is not sufficient ground for a prohibition, to suggest that the spiritual court objected to the credibility of a witness, nor to suggest that the plaintiff had only one witness to prove the fact, unless that he allege that he offered such proof, and it was refused for insufficiency. Carth. 143, 144.

Although regularly, where the spiritual courts have consufance of the principal, they shall have consufance of the incidents and accessaries; yet if the incident is a matter merely temporal, or if a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the temporal law; otherwise they will be prohibited.

As if payment be pleaded in bar of a legacy, and there be but one witness, which the ecclesiastical court will not admit, because their law requires two witnesses; there, the temporal courts will prohibit them, because it is a matter temporal, that bars the ecclesiastical demand.

Carth. 143. But if there be only one witness to prove a nuncupative will, and the ecclesiastical court refuse the (a) probate thereof, because to every such will their law requires two witnesses, no prohibition lies; because there is no other way of authenticating such will but in the spiritual court, and this being the principal matter, they had consufance thereof.

per Cur. (a) Yet if a revocation of such a will is pleaded, and proved by one witness, and they refuse the plea for want of sufficient proof, a prohibition will go, because the revocation is a temporal matter. Yeiv. 92. by three judges against two, & vide 2 Roll. Abr. 299. Carth. 143. S. C. cited.

For this vide tit. Executors and Administrators, and there, that in certain cases, the court of Chancery will compel executors to give security, 3 Vol. 7-8. If the spiritual court admit a will, but yet will not give the probate to the executor because he cannot give security for a just administration, the temporal courts will grant a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will.

Skin. 299. pl. 2. Salk. 36. pl. 1. (b) But if an executor becomes

non compos, the spiritual court may commit administration to another, because that is a natural disability. Salk. 36. pl. 1.

(c) Hob. 255. Cro. Jac. 279. 364. Cra. Car. 16. 2 Roll. Abr. 285. But the jurisdiction of the ecclesiastical courts is confined to wills relating to goods and chattels only; and therefore (c) if a man gives lands to be sold for the payment of debts, and disposes of the money to several persons, that cannot be sued for in the ecclesiastical courts, but only in a court of equity; because that is not a legacy merely of goods and chattels, but it arises originally out of lands and tenements.

Lev. 179. Sid. 279. 2 Keb. 8. S. C. But if a rent be devised out of a term for years, the ecclesiastical courts may hold plea thereof; for the term for years being only

only a chattel, is testamentary, and, consequently, the rent devised thereout.

If a man makes a will, and appoints *A.* and *B.* his executors, to each of whom he gives five pounds, but makes no disposition of the residue of his estate, the ecclesiastical courts cannot compel a distribution of (*a*) such residue, for they have only a jurisdiction to order a distribution where the party dies intestate.

Petit v. Smith, Ld. Raym. 86. 1 P. Wms. 7. S. C. Comb. 378. S. C. Com.

Rep. 3. S. C. 5 Mod. 247. S. C. and a prohibition granted accordingly. (*a*) Where the courts of equity in such case consider the executors as trustees only, and compel a distribution, *vide* tit. *Executors and Administrators*, and where they have a concurrent jurisdiction with the ecclesiastical courts, *vide* Chan. Ca. 200. 2 Chan. Ca. 85. 95. 2 Vent. 362. 2 Vern. 47. 76. Preced. Chan. 546.

Matrimonial causes, as marriage contracts, consanguinity, divorces, alimony, &c., are within the jurisdiction of the spiritual court.

But for this, *vide* tit. *Marriage*.

Tithes, oblations, mortuaries, and pensions, are of ecclesiastical consueance; but if to a demand of tithes the party pleads a *modus decimandi*, such custom, like all (*b*) others, must be determined in the temporal courts; and if the ecclesiastical courts take upon them to determine it, a prohibition will lie.

Vide head of *Tithes*. (*b*) As if the churchwardens libel against *J. S.* for

not repairing part of the church wall; wherein he sets forth, that *J. S.* was seised of such a manor, &c. and that the lords thereof, for the time being, were by custom immemorial bound to repair part of the wall *ratione tenuræ*; if if this custom be denied, a prohibition will be granted, although after sentence, for on the face of it, it appears that the spiritual court had not jurisdiction. Carth. 33. *Vide* Carth. 151.

But if *A.* sues for subtraction of tithes in the spiritual court, and the defendant pleads a verbal composition for two years, no prohibition will be granted: and where the ecclesiastical courts refuse a plea of composition for life or years, there is no remedy but by appeal to the arches.

Carth. 70. Bradshaw and Swanton, adjudged.

The ecclesiastical courts have no jurisdiction to hold plea of a matter of record; therefore, if the parson of a church be outlawed, and the benefit of the outlawry be granted to *J. S.*, who receives the tithes from the parishioners, and afterwards the parson sue the parishioners for tithes, who plead the outlawry and the grant to *J. S.*, a prohibition lies; for the outlawry is a matter of record, of which they have not consueance.

2 Roll. Abr. 307.

The spiritual courts cannot hold plea *pro reformatione morum*, in a cause that is criminal and (*c*) triable at our law; and, therefore, they cannot hold plea *pro reformatione morum* for a legal perjury; but for perjury in their own courts they may punish.

Lev. 138. Sid. 217. Keb. 721. (*c*) But they may depose for a temporal crime. Dyer, 293. But not after the crime is pardoned. Hob. Searl's Case. Comp. In-

cumb. 53.

So, if the spiritual court proceed against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

Comb. 71.

If the goods of a church be stolen, it is sacrilege and robbery, and the churchwardens shall have an (*d*) appeal of robbery; also, (*e*) the offender may be libelled against in the spiritual court *pro salute animæ & reformatione morum*, but not to recover damages.

(*d*) Bro. Appeal, 31. 45. 37 H. 6. 39. (*e*) Sid. 281. 2 Keb. 23. 2 Inst. 492.

4 Keb. 743. An action at law lies for a battery on a spiritual person, as also a suit in the spiritual court for reverence to his character. 6 Mod. 156. *Vide* Cro. Eliz. 655

(E) How they are to proceed, as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

4 Co. 29. a. **T**HE ecclesiastical jurisdiction is derived from the common law, but the form of the proceedings, and the coercive power exercised in the ecclesiastical courts, is after the form of the canon or civil law; and, therefore, the judges of the common law will give credit to their proceedings and sentences, in matters in which they have a jurisdiction, and believe them consonant to the law of the holy church, although against the reason of the common law; and if there be a *gravamen* it must be redressed by appeal.

Skin. 27. They may cite the members of a corporation by their christian names and names of baptism, for a duty due from them in their corporate capacity, as a rate for not repairing a church; for they have no *distingas* as at common law, by which they may take their lands or goods, and therefore must proceed against them in their natural capacity.

5 Mod. 449. A citation may be served on a *Sunday*, or, according to the custom of the ecclesiastical court, it may be fixed to the church-door on a *Sunday*; and this shall not be said to be restrained by the 29 Car. 2. cap. 7. which prohibits the serving of any process whatsoever upon a *Sunday*, except in cases of treason, felony, or breach of the peace.

For the proceedings *ex officio* before this statute, *vide* Cro. Eliz. 201. Cro. Car. 291. Moor, 755. pl. 1342. Cro. Jac. 37. Jones, 257. And for the construction of this statute *vide* Sid. 232. Mod. 135. 10 Mod. 347. Ld. Raym. 263. 463. 2 Ld. Raym. 767. 2 Mod. 118. Vent. 41.

By the 13 Car. 2. cap. 12. it is enacted, "That it shall not be lawful for any archbishop, bishop, vicar general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer or minister, or any other person, having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer, unto any person whatsoever, the oath usually called the oath *ex officio*, or any other oath, whereby such person, to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself, of any criminal matter or thing, whereby he or she may be liable to any censure or punishment."

2 Roll. Abr. 298. Palmer's case. If a man is proceeded against in the spiritual court for defamation, and the libel charges that he spoke such and such words, *aut in effectu consimilia*, although a declaration at law, in this form, would be naught for uncertainty; yet the libel is good, being according to the course of the ecclesiastical court.

2 Roll. Abr. 292. (a) But where an executor pleads *plenem admissit*, and the plea was refused, a prohibition was moved for, but denied being a matter of ecclesiastical consuance. Sid. 274. Keb. 939. Saunderson's Case, & *vide* Noy, 77. Latch. 114. Goff. 4. (b) That there must be an affidavit of such refusal. Skin. 20. pl. 20.

If the spiritual court refuses to give a copy of the libel, a prohibition will be granted *quousque*; but there must be an affidavit that such copy was demanded and refused. Vent. 252.
6 Mod. 303.

The ecclesiastical court can (a) neither fine, imprison, nor amerce; for their jurisdiction being founded on the canon or civil law, their proceedings are only by ecclesiastical censures. 11 Co. 44. a.
4 Inst. 324.
Noy, 17.
(d) They have but two sorts of punishment, penance and costs, which first may be commuted or dispensed with for money. 5 Mod. 70.

If a man be sued in the ecclesiastical court, and the judge take an obligation from him that he will perform the sentence, a prohibition lies; for if it be in a matter within his jurisdiction, there are lawful means of compelling him to perform the sentence. 2 Roll. Abr. 302.

Of the Court of Admiralty.

THE court of Admiralty is a court for all maritime causes or matters arising upon the high sea, and its jurisdiction is derived from the king, who (b) protects his subjects from pirates, &c., and who has (c) a dominion over all the *British* seas; this jurisdiction he exercises by the (d) lord high admiral, or those lawfully deputed for that purpose. 4 Inst. 142.
(b) Inst. 167.
(c) Molloy, 66. Selden's *Mare Clausum*. (d) For the antiquity

of this high officer, *vide* Co. Lit. 260. 12 Co. 80. And for antient records relating to his jurisdiction, *vide* 4 Inst. 142.—By the 2 W. & M. Sell. 2. c. 2. commissioners of the admiralty have the like authority and jurisdiction as the lord high admiral.—By the 2 H. 5. stat. 1. c. 6. the king by letters patent may appoint in every port a conservator of a truce, worth 40*l.* per ann. in land; and who by the king's patent, and the admiral's commission, shall inquire of offences against truce and safe conduct, &c. as the admirals have done, &c. saving the determination of the death of a man, and the execution thereupon, to the admiral. The lord warden of the *cinqve ports* is also admiral there, and hath the jurisdiction of the Admiralty exempt from the admiralty of England. 4 Inst. 223. 2 Jones, 66, 67.—which jurisdiction is saved to him by several acts of parliament, as 2 H. 5. stat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. *Vide, &c.*

[The jurisdiction of the admiralty is twofold, and holden before distinct tribunals: the one, is the ordinary court for deciding in controversies relating to contracts made at sea, and is called the *instance* court: the other determines the right to maritime captures and seizures, and is called the *prize* court. The jurisdiction in both cases is exercised by the same person: he is appointed judge of the admiralty by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction, but makes no mention of prize. To constitute *that* authority, or to call it forth, in every war, a commission under the great seal issues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge Douglass. 613-4.

of the said court, his surrogate or surrogates, and they are thereby authorised and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods, that are, or shall be taken; and to hear and determine, according to the course of the admiralty, and the law of nations. And a warrant issues to the judge accordingly.]

For the better bringing together the several cases and resolutions that have been in the temporal courts, relating to the jurisdiction of the court of admiralty, I shall consider,

- (A) To what Places the Jurisdiction of the Admiralty is confined.
- (B) To what Things its Jurisdiction extends: And herein of such Matters as arise, partly on Sea, and partly on Land.
- (C) To what Contracts its Jurisdiction extends: And herein of Contracts made on the Sea.
- (D) To what Crimes and Offences its Jurisdiction extends.
- (E) By what Law it proceeds; and the Form of such Proceedings.

(A) To what Places the Jurisdiction of the Admiralty is confined.

(a) As 4 Inst. 137, 138, 139, 140. 12 Co. 129. Moor, 122. 892. Godb. 261. 2 Sid. 81. **I**T is laid down as a general rule in our common law books, that the admiral's jurisdiction is confined to matters arising on the (a) high seas only, and that he cannot take cognisance of contracts, &c. made or done in any river, haven, or creek, within any county; and that all matters arising within these are triable by the common law.

Hob. 79, 212. 13 Co. 52. 2 Brownl. 10. 37. 2 Bulst. 322. Roll. Rep. 133. But our books seem not to be agreed what shall be counted *altum mare*, or the high sea; by some, it is no part of the sea where one may see what is done on the other side of the water. 4 Inst. 140, 141. 12 Co. 80. Moor, 892.—That what is within the body of the county is no part of the sea. 4 Inst. 140.—That the admiralty court cannot hold plea of a thing done upon the river Thames, because within the body of the county. Roll. Abr. 531. Owen, 122. 2 Brownl. 37. S. C. adjudged. Leon. 106. Moor, 916. 2 Roll. Rep. 413. S. P. adjudged.—Nor of a matter arising at Limehouse. Cro. Jac. 514. 2 Roll. Rep. 49. Moor, 891. S. P. adjudged.—But by Owen, 123. such place as is covered with salt water is *altum mare*.—And Roll. Rep. 250. By *Cote*, the admiralty court hath cognisance of a matter done in a ship, riding in a port that is not within the body of a county.—But it seems agreed, that though in a libel in the court of Admiralty the fact is laid to be done *super altum mare*; yet it may be surmised that it was done *in corpore com.*, &c. and thereupon a prohibition will be granted, for the surmise is traversable. Moor, 891. pl. 1255. Latch. 11.

But it hath been resolved, That between the high and low water mark, the common law and admiralty have *imperium divisum*, *scilicet*, the one when it is not, and the other when it is covered with water; and that (a) the soil upon which the sea flows and reflows, may be parcel of a manor.

5 Co. 107.
Sir Henry
Constable's
case.
And. 29.
S. C. 3 Inst.
113. S. P.

(a) If a man's lands lie to the sea, if they are increased by insensible degrees, they belong to the soil adjoining; but if the sea leaves any shore by a sudden falling off of the water, then such enclosed lands belong to the king. Dyer, 326. 2 Roll. Abr. 170. If a river, as far as there is a flux of the sea, leaves its channel, it belongs to the king; for the English sea and channels belong to the king, and he hath the property in the soil, having never distributed them out among his subjects. 2 Roll. Abr. 170.— But if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have, in that case, the property in the soil, being no original part or appendix to the sea, but distributed out as other lands. 2 Roll. Abr. 170.— If the sea overflow my land for forty years, and after re-flow, yet I shall have my land again; for the act of nature cannot alter the property. 2 Roll. Abr. 1168.

By the 13 R. 2. cap. 5. Upon complaint of incroachments made by the admirals and their deputies, it is enacted, "That the admirals and their deputies shall (b) meddle with nothing done within the realm, but only with things done upon the sea." For the construction of this statute, vide 3 Bull. 205. (b) This must be intended of holding pleas, and not of awarding execution; for, notwithstanding this statute, the judge of the Admiralty may do execution in the body of the county. 13 Co. 52.

By the 15 R. 2. cap. 3. upon the like complaint, it is declared, "That all contracts, pleas, and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral shall have no cognisance, but they shall be tried, &c. by the law of the land; but (c) of the death of a man, and of mayhem done in great ships, being in the main stream of great rivers beneath the (d) bridges near the sea, and in no other place of the same river, the admiral shall have cognisance; and also to arrest ships in great flotes, for the great voyages of the king and the realm, saving to the king his forfeitures; and he shall have jurisdiction in such fleets during such voyages only, saving to lords, &c. their liberties." (c) By the resolution of the judges in Cro. Car. 297., by the equity of this statute he may redress all annoyances and obstructions in those rivers, which are an impediment to navigation, and may try

contracts and injuries done there which concern navigation at sea; but (d) In Owen, 122. it is said per Cur., That the translator mistook bridges for points, as the land's end. [The words in the act are, "*paraval les pontz.*" In the old abridgment it is *paris*: in the *Nova Statuta* it is *pointz*.]

By the 2 H. 4. cap. 11. reciting the 13 R. 2. cap. 13. it is enacted, "That he that (e) finds himself aggrieved (f) against the form of the statute, shall have his action by writ grounded upon the case against (g) him that so pursues in the Admiralty, and recover his double damages against him, and he shall incur the pain of 10*l.* if he be attainted." (e) The action may be brought by one party-owner, for it is grounded merely on a tort.

Carth. 295. [Ca. temp. Hardw. 271. 2 Str. 1075.] (f) If upon petition to the judge of the Admiralty, a ship is stopped in the harbour till caution given not to trade within the limits of the East India Company, this is a prosecution within the statute, though there is no formal plaintiff or defendant; and in many cases the suits there are against the ship itself. Carth. 294. Skin 361. pl. 3. 4 Mod. 176. Salk. 31. pl. 1. 3 Lev. 353. S. C. between Child and Sands. (g) Though the prosecution be by the command of the king, and in the name of his proctor, yet if it was upon the solicitation and by the procuration of the parties, and they pay the fees, they pursue within the intention of the act. 3 Lev. 353.

[The above statutes, it hath been solemnly determined, are intended to check the usurpations of the *Infance* court only, and

Lindo v.
Rodney,
Doug. 613.

do not at all relate to the *Prize* court; for the jurisdiction in cases of prize does not depend on the locality, but the nature of the question, which is not governed by the rules of the common law, but by the *jus belli*. Hence, the prize court have exclusive cognizance of all captures made *at land* by the assistance of a fleet.]

(B) To what Things its Jurisdiction extends: And herein of such Matters as arise partly on Sea, and partly on Land.

5 Co. 107. 2 Inst. 167. 4 Inst. 154. Palm. 96. Sid. 178. Roll. Abr. 531. **T**HE Admiralty court has jurisdiction, where a ship founders, or is split at sea, over the goods which become (a) *flotsam*, *jetsam*, or *ligam*; and a suit for these must be in that court; but for goods wrecked they (b) must be claimed by action at common law.

(a) There are four sorts of shipwrecked goods, viz. *flotsam*, *jetsam*, *ligam*, and *wreck*. *Flotsam* is when the ship is split, and the goods float upon the water between high and low water mark; *jetsam* is when the ship is in danger to be drowned, and for saving the ship the goods are cast into the sea; *ligam*, *logam*, or *ligan*, is when the heavy goods are cast into the sea with a buoy, that the mariners may know where to retake them; *wreck* is, where goods shipwrecked are cast upon the land; these, when all the crew are drowned, belong to the king, or the lord of the manor, to whom, it is presumed, the king has granted them; but by Westm. 1. c. 4., if a dog or cat (which are put for instances) escape alive, the right owner shall have them again, if he claim them within a year and a day after the seizure. 2 Inst. 167. 5 Co. 106. Bract. lib. 3. f. 120. Molloy, 237. See the stat. 12 Ann. stat. 2. c. 18. and 26 Geo. 2. c. 19. (b) By the express words of 15 R. 2., they have no consufance of goods wrecked.

Sid. 178. And although the Admiralty court has jurisdiction of *flotsam*, *jetsam*, and shall determine what it is by the rules of the civil law, yet that must be understood where the thing is *super altum mare*; and, therefore, if a ship, which becomes *flotsam* and derelict, comes into the body of a county, they have no jurisdiction.

2 Mod. 294. So, if *flotsam* comes to land, and is taken by one that hath no title, an action lies at common law, and no proceedings shall be thereon in the Admiralty; for it need not be condemned as a prize.

4 Inst. 148. At (c) common law, none but the king only could erect beacons, light-houses, and sea-marks; but of later times, by letters patents granted to the lord admiral, he hath power to erect (d) beacons, sea-marks, and signs for the sea. (c) But by 8 Eliz. c. 13. the matter, wardens, assistants of the Trinity House at Deptford Strand, had power given them to erect beacons, marks, and signs for the sea, &c. vide 2 Inst. 140. (d) A suit for the profits of the beaconage of a rock in the sea, near — in Cornwall, may be in the court of Admiralty. Crofs and Diggs, Sid. 158. adjudged; and it was said, as the profits of the beacons belong to the admiral, so the suit for them ought to be in his court, though the rock be the freehold of another, and part of his inheritance.

Vent. 173. If the original cause arises upon the sea, and other matters happen upon the land depending thereupon, yet the trial shall be in the court of Admiralty.

Roll. Abr. 533. As, if a man takes a thing upon the sea and brings it to the land, and afterwards carries it away, the suit for this shall be in the Admiralty court, for this is a continued act.

4 Inst. 130. 12 Co. 67. 12 Mod. 135. Like point.

So,

So, if goods are taken piratically out of a ship, and afterwards sold upon land, a suit may be commenced in this case in the Admiralty court, against the vendee. March, 110. Cro. Eliz. 685. S. P. adjudged; And that in
 unless the sale had been in a market overt: But *vide* Hob. 78. Roll. Abr. 531, 532. And that in
 such case the party may have an action of trover and conversion at common law.

So, if a ship be taken by pirates and carried to *Tunis*, and there sold, it being originally within the jurisdiction of the admiral, it so continues, notwithstanding the sale afterwards upon the land. Vent. 308.

But if the owner of a ship sends her to the *Indies* to merchandize, and the crew commit piracy, by which, according to the admiral law, the ship becomes forfeited, and the admiral seizes her accordingly, if afterwards the owner takes the sails and tackling out of the ship, lying *infra corpus com.*, no suit for this can be in the Admiralty court; for the admiral hath his remedy by action at common law. Roll. Abr. 532. Roll. Rep. 285. S. C. adjudged. 3 Bull. 148. [But if a ship be arrested by process out

of the Admiralty court for a matter arising within their jurisdiction, and she be rescued afterwards at land, the cognizance of the rescue belongs to the Admiralty jurisdiction. *Rigden v. Hedges*, 1 Ld. Raym. 446. *Per* Holt, C. J.]

If a suit be in the Admiralty court for making a lighter for the carriage of mud, or the like, within the body of the county upon the *Thames*, and not for navigation, a prohibition lies. Roll. Abr. 533.

If a ship is taken by pirates upon the sea, and the master to redeem the ship contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of *S.* and there he pays it with money borrowed, and gives bond for the money, he may sue in the Admiralty for the 50*l.* because the original cause arose upon the sea, and what followed was but accessory and consequential. Hard. 183. Spark and Stafford, adjudged.

If there be wars with the *Dutch*, and one having letters of marque take an *Offender* for a *Dutch* ship, and bring it into an haven, and libel against it to have it condemned as a prize, but sentence be given that it was no prize; the *Offender* may libel in the Admiralty against the captain, for the damage the ship received while it lay in the port; for the original taking being at sea, the bringing it into the port, in order to have it condemned, is but a consequence thereof. Lev. 243. Turner and Neal. Sid. 367. S. C. adjudged.

If an *English* ship takes a *French* ship richly laden, the *French* being in enmity with us, and such ship is libelled against, and after due notice on the *Exchange*, &c. declared a (a) lawful prize, the king's proctor may exhibit a libel in the Admiralty court, to compel the taker (who sent the ship to *Barbadoes*, and converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence the property was veited in the king, and that this second libel was in nature of an action of trover, of which the court of Admiralty cannot hold plea. Carth. 499. Rex v. Broom, Ld. Raym. 271. adjudged; being fully debated; and that the second libel was but a continuance of the first suit, and a charge

grounded upon the first sentence by way of execution thereof. *Salk.* 32. pl. 3. S. C. & *vide* Carth. 423. (a) That prize or no prize is a matter altogether appropriated to the jurisdiction of the Admiralty, and not triable at common law, *vide* Carth. 475, 476. [And that court having exclusive jurisdiction

over all questions of prize; hath the same jurisdiction over all matters that are consequential to it, *Le Caux v. Eden*, Dougl. 104. &c. *Lindov. Rodney*, *id.* 591, n. 1. *Livingstone v. McKenzie*, 3 Term Rep. 332. *Smart v. Wolff*, *id.* 123. or arise incidentally in the construction of acts of parliament or proclamations. *Horne v. Earl of Camden*, 1 H. Bl. 466. *contr.* but reversed in K. B. 4 Term Rep. 382. and that reversal affirmed in parliament. Printed Cases of the Lords, June 22d 1795.]

(C) To what Contracts its Jurisdiction extends:
And herein of Contracts made on Sea.

4 Inst. 134. THE court of Admiralty hath no jurisdiction as to contracts
139. 12 Co. made at (a) land, whether such contract be made here or in
105. Hob. foreign parts.
79. 212.
(a) If a contract be made upon the sea, which is afterwards sealed upon the land, the court of Admiralty cannot hold plea thereof. Hob. 79. 212.

Latch. 11. If a ship lying at anchor wants victuals, and sends to land to
per Dod. J. S. to bring victuals, and so the contract is made in the ship,
the Admiralty shall have consuance; *secus*, if the contract is
made entirely at land, and the victuals after sent to the ship.

Hob. 12. If a contract or obligation be made upon the sea, yet if it be
Bridgman's not for a marine cause, the suit upon this contract or obligation
case. shall be at common law, and not in the Admiralty court; for if
Roll. Abr. a man makes an obligation for the security of a debt growing
532. S. C. before upon the land, or if he makes a promise to pay it, this
cannot be sued in the court of Admiralty, but at common
law.

Roll. Abr. If a man contracts with me in *London*, in consideration of
325. 100*l.* to transport certain commodities into *Turkey*, if he does
4 Inst. 139 not perform it, I cannot sue him in the court of Admiralty,
because the contract was here, and nothing done upon the sea.

Roll. Abr. If a charter-party be made in *England*, to do certain things in
532, 533. several places upon the sea, though no act is to be done in *Eng-*
Roll. Rep. land, but all upon the sea, yet no suit can be in the Admiralty
486. S. C. court for the non-performance of the agreement; for the contract
4 Inst. 135. is the original, (b) without which no cause of suit can be, and this
139. 142. contract is out of their jurisdiction; and where part is triable by
Moor, 450. the common law, and part by the admiral law, the common law
(b) Both the shall be preferred.
contract and
concur to
make the cause of suit, which is entire; therefore, &c. Hob. 212.

Roll. Abr. In cases of necessity, the master may hypothecate or pledge the
530. ship or goods, and (c) such contract is cognizable in the Admi-
Hob. 11. ralty court.
Moor, 918.

(c) That such hypothecation is allowed, because no other remedy at common law; but where *A.* contracted with *B.* for a cable, which he delivered at Ratcliffe upon Thames, and *B.* sued in the Admiralty, a prohibition was granted; though it was insisted, that the want of the cable was occasioned by the stress of weather at sea; for here the contract was at land, and a remedy for the breach at common law; but had the hypothecation been at Rotterdam, or in any other foreign part, the remedy had been proper in the Admiralty court. *Salk.* 34. [An hypothecation bond given in the course of a voyage, though it be executed on land, and *under seal*, is cognizable in the Admiralty court. *Menetone v. Gibbons*, 3 Term Rep. 267. *Johnson v. Shippen*, 2 Ld. Raym. 982. 1 *Salk.* 35. S. C. 6 Mod. 79.]

Winch. S. The mariners may sue in the Admiralty court for their wages,
4 Inst. 141. although the hiring was by the master on land; and this is al-
Vent. 146. lowed

flowed of in favour of navigation, for here they may all join in the same libel: also, by the admiral law they have remedy against the ship and owners, as well as against the master; and it would be a great discouragement to seafaring men, to oblige them to bring separate actions, and those against a master, who may happen to be insolvent.

2 Ld. Raym. 1021. 12 Mod. 405. [In the case above referred to in Salk. 33. p. 4., Lord Holt is made to say, that it was by mere indulgence that mariners were permitted to sue in the Admiralty for their wages: that it is against the statute of 15 R. 2. expressly, but that *communis error facit jus*. But the stat. 4 Ann. c. 16. § 17. puts suits for seamen's wages very clearly, though by implication, upon a legal footing, for the words of that section are, "That all suits and actions in the court of Admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue."]

So, of the other officers under the master, as the (a) mate, (a) Salk. 33. (b) purser, boatswain, &c. for though they contract with the pl. 5. master, yet it is on the credit of the ship, &c. 2 Stra. 937. 2 Barnard.

K. B. 160. 12 Mod. 440. (b) Raym. 3. 2 Stra. 853. 2 Barnard. K. B. 297. So, a carpenter, Stra. 707. 2 Vent. 181. Salk. 53. pl. 5. Mod. 93.

So, a shipwright may sue in the Admiralty court for the (c) Roll. (c) building of a ship (a) for navigation upon the sea. Abr. 533. For amend-

ing a ship. Cro. Car. 246. (d) If a contract be with seamen to go on a voyage, and they, in order thereto, work in a harbour, and after, the voyage is intercepted through the owner's fault, as, if the ship be arrested for his debt, &c.; the seamen shall sue for their wages for the work done in the harbour, in pursuance of the contract to go on a voyage, in the Admiralty, as much as if they had gone the voyage; *scilicet*, if the retainer of them had been only to do the work in the harbour. 6 Mod. 238. 2 Ld. Raym. 1044. [2 Will. 264.]

But if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual; or if the agreement is under seal, the mariners cannot sue in the Admiralty court. Salk. 31. pl. 1. Opy and Addition. [Cam- pion v. Nicholas, Stra. 405. Day v. Searle, 2 Stra. 968. How v. Nappier, 4 Burr. 19.]

Nor can the master sue in the Admiralty court; for his contract is on the credit of the owners, and not like that of the mariners, which is on the credit of the ship. 4 Inst. 141. Raym. 3. Salk. 33. pl. 4. Id. Raym. 576. [Com. Rep. 74.] Carth. 518. S. P. although the owner was beyond sea, and the ship lay here.

If a contract is made at *Malaga*, concerning the lading of a ship, and for breach thereof upon the sea, *viz.* that he would not receive forty butts of wine into the ship, according to agreement, there is a libel in a foreign Admiralty, and sentence that the wine shall be received into the ship, which is refused; yet there can be no suit in the Admiralty here, reciting the former sentence; and charging the defendant with a breach thereof; for though one may libel here upon a sentence in a foreign Admiralty, for the execution of it, yet there being no complete sentence in the foreign Admiralty, but an award only, that the wine should be received; this suit for breach thereof is in nature of an original suit, which ought not to be, though the breach was at sea, because upon a contract made at land. Vent. 32. Jurado and Gregory, Sid. 418. Lev. 267. S. C.

If there are several partners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; Carth. 26. Knight and Berry, ad-

judged, and prohibition to such a suit granted, though after sentence and appeal to the delegates; *Et per Holt*, the part-owners, who are the major part, are not without remedy in such case; for a special action on

gree; whereupon, according to the common usage in such cases, the greater number suggest in the Admiralty court, the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themselves jointly and severally to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in the ship of those who disagree to the voyage, against all adventures; there can be no suit on this agreement or stipulation in the admiralty court; for the contract was made on land, and therefore the temporal courts must have consueance of it.

the case may be framed at the common law. *Hard. 473. S. P., but no resolution. 6 Mod. 162. S. P., but no resolution.* [The whole doctrine here advanced hath been over ruled, and the right of the Admiralty court to compel security in such case as well for the freight, as for the value of the respective shares in the ship, in the event of her being lost, and to do execution upon it, hath been recognized in several subsequent cases. *Dimmock v. Chandler, Fitzg. 197. 2 Str. 850. S. C. 1 Barnardist 415. S. C. Lambert v. Achettee, 1 Ld. Raym. 227. Blacket v. Ansley, id. 235. De Grave v. Hedges, 2 Ld. Raym. 1295. Ouston v. Hebden, 1 Will. 101. Such right had indeed been allowed in preceding cases. Anon. 2 Ch. Ca. 36. Shelly v. Winson, 1 Vern. 297. Anon. Skin. 230.*]

(D) To what Crimes and Offences its Jurisdiction extends.

See 2 H. H. P. C. 12., &c. 2 Hawk. P. C. c. 25. § 43. How piracy, and offences committed on the sea, were punished before this statute, *vide* 4 Aff. 25. 3 Inst. 115. S. P. C. 10. b. H. P. C. 77. 3 Inst. 112. (a) This must be intended between the high water and low water-mark, where there is *divisum imperium* at several times. 3 Inst. 113. But if done in such creek or haven where the admiral

BY the 28 H. 8. *cap.* 15. it is enacted, "That all felonies and " robberies, &c. upon the sea, or in any haven, river, creek, " or place, where the admiral or admirals have, or (a) pretend to " have power, authority, or jurisdiction, shall be inquired, tried, " heard, determined, and judged in such shires and places in the " realm as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition as " as if any such offence or offences had been committed or done " in or upon the land; and such commissions shall be had under " the king's great seal, directed to the admiral or admirals, or to " his or their lieutenant, deputy or deputies, and to three or four " such other substantial persons as shall be named or appointed by " the lord (b) chancellor of *England* for the time being, from " time to time, and as oft as need shall require, to hear and determine such offences after the (c) common course of the laws " of this land, used for felonies and robberies, &c. done and " committed upon the land within this realm: *And it is further enacted*, That if any person or persons happen to be indicted " for any such offence done, or hereafter to be done upon the " seas, or in any other place, above limited, that then such order, process, judgment, and execution shall be used, had, done, " and made to and against every such person and persons so being indicted, as against felons, &c. for any felony, &c. upon " the land, by the laws of the land is accustomed; and such as " shall be convicted of any such offence, by verdict, confession, or " process, by authority of any such commission, shall have and " suffer

“suffer such pains of death, losses of lands, goods, and chattels,
 “as if they had been attainted and convicted of such offence
 “done upon the land; and also, that they shall be excluded from
 “the benefit of the clergy.”

hath no jurisdiction,
 the commissioners cannot meddle with it.

Owen, 122. Moor, 756. Roll. Rep. 175. H. P. C. 77. (b) Hob. 146. (c) Yet it still remains an offence of a special nature; and therefore the indictment must allege the fact to be done upon the sea, and must have both the words *felonice* and *piratice*; and no offence is punishable by virtue of this act as piracy, which would not have been felony if done on land; consequently, the taking of an enemy's ship by an enemy is not within the statute. 3 Inst. 112. S. P. C. 114. Roll. Rep. 175.—And although the statute ordains, that it shall have the like trial and punishment as are used for felony at common law, yet this shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; and therefore it shall not be included in a general pardon of all felonies. Moor, 756. 3 Inst. 112. Co. Lit. 3, 1. H. P. C. 77. 2 Hal. Hist. Plac. Cor. 370.—Nor shall an attainder for this offence work any corruption of blood. 3 Inst. 112. H. P. C. 77.—But it hath been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment of *perpetuitate et auctoritate*. 3 Inst. 114. Dyce, 2, 1. [But by 12 Geo. 3. c. 20 “standing mute in piracy” amounts to a conviction, and the court shall award the same sentence as on a conviction by verdict or “confession.”]

It was (a) held, that by force of this statute accessories to this offence could not be tried; but this is remedied by 11 & 12 W. 3. cap. 5. by which their aiders, and comforters, and the receivers of their goods, are made accessories, and to be tried as pirates, by 28 H. 8. cap. 15. [And by 8 Geo. 1. c. 24. made perpetual; by 2 Geo. 2. c. 28., persons made accessories by 11 & 12 W. 3. are to be deemed principal pirates, felons, and robbers, and to be proceeded against accordingly.] Also, the said statute 11 & 12 W. 3. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of *England*.

(a) Vide
 Xelv. 134.

By the 5 Eliz. cap. 5. § 30. several offences in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of *oyer* and *terminer*, according to the statute of 28 H. 8. cap. 15.

By 1 Ann. sess. 2. cap. 9. § 4. captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 H. 8. cap. 15.

And by 4 Geo. 1. cap. 11. § 7. all persons, who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 W. 3. cap. 5. may be tried and judged for every such offence according to the form of 28 H. 8. cap. 15. and shall be excluded from their clergy.

See 4 G. 1.
 c. 12 § 3.
 & 8 G. 1.
 c. 24., made
 perpetual by
 2 Geo. 2.
 c. 28. § 7.

and 11 Geo. 1. c. 29. § 6. 13 Geo. 2. c. 30.

[By stat. 33 Geo. 3. c. 66. § 70., which is to continue in force during the present hostilities with *France*, a session of *oyer* and *terminer* and gaol-delivery for the trial of offences committed on the high seas, within the jurisdiction of the Admiralty of *England*, is required to be holden twice at least in the year. And § 71. any commissioner named in the commission for trying such offences, or any justice of the peace may take informations upon oath touching the said offences, and cause the parties to be apprehended and committed; and shall bind over all persons, whom § 72.

§ 73.

they shall respectively judge necessary, to appear, prosecute, and give evidence against the offender at the next Admiralty sessions, which information and recognizance shall be transmitted to the registrar to be laid before the court: And the marshall, his deputy, all sheriffs, and other officers for keeping the peace are required diligently to obey and execute the precepts, warrants, and orders of the court.]

(E) By what Law it proceeds, and the Form of such Proceedings.

Godolph. Adm. Juris, 40. (c) So called, for that they were made by King Richard I. when he was there. Co. Lit. II. b. 260. b.

ALL maritime affairs are regulated chiefly by the civil law, the Rhodian laws, the laws of (a) *Oleron*, or by certain peculiar and municipal laws and constitutions appropriated to certain cities, towns, and countries bordering on the sea.

Roll. Abr. 517. 1. but vide Roll. Rep. 285.

If the owner of a ship victuals it, and furnishes it to sea with letters of reprisal, and the master and mariners when they are at sea commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the admiral law, and our law ought to take notice thereof.

Sid. 179. Mod. 93. Vent. 146. 12 51 d. 408, 409. 442. (b) But whether the executors of those mariners who died before the casting away of the ship may recover the wages due to their testators, *Q. & vide Sid. 179. Keb. 684.* (c) For refusing to fight when commanded by the master, *vide 22 & 23 Car. 2. c. 1.*

By the civil law and custom of merchants, if the ship be (b) cast away, or perish through the mariners' default, they lose their wages; so, (c) if taken by pirates, or if they run away; for if it were not for this policy they would forsake the ship in a storm, and yield her up to enemies in any danger.

Roll. Abr. 530. Wier's case. (d) So, upon a judgment given in a court of admiralty, execution may be sued in foreign parts. Godb. 260. *arguendo.*—If a ship is condemned as the king's prize in a foreign admiralty,

If a man of *Friesland* sues an *Englishman* in *Friesland* before the governor there, and there recovers against him a certain sum, upon which the *Englishman*, not having sufficient to satisfy it, comes into *England*, (d) and the governor sends his letters missive into *England*, *omnes magistratus infra regnum Angliæ rogans* to make execution of the said judgment, the judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation shall be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of *England* (e) takes notice of this law, and the judge of the Admiralty is the proper magistrate for this purpose, for he only hath the execution of the civil law within this realm.

such sentence may be executed here. Salk. 32. pl. 3. 33. (e) If a ship is sold by virtue of a sentence in the court of Admiralty in France, (being then in amity with England,) the sentence shall not be examined in an action at common law; for we ought to give credit to their sentences, else they will not give credit to the sentences of our court of Admiralty. 2 Ld. Raym. 893. 936. but the way to be relieved is to petition the king, who will examine the case, and, if he finds cause of complaint, send to his ambassador residing there, and upon failure of redress will grant letters of marque and reprisal. Raym. 473. Skin. 59. pl. 2. & vide Vent. 32. — But where the court said they would give no regard

regard to a sentence in the court of Admiralty of Scotland, *vide* Rudly and Eggesfield, 2 Sand. 259, 260. Vent. 174. — But it was agreed the sentence in Scotland was pleadable in the court of Admiralty here. Vent. 274. 2 Lev. 25. and 2 Sand. 260. The validity of the sentence of the Admiralty in Scotland is determinable by the law of the Admiralty here.

The (a) master of a ship may hypothecate or pledge the ship without the consent of the owner, for tackling and victuals, or he (b) may borrow money for the necessaries of the ship, and in such cases the party may in the Admiralty court (of which our law will take notice) (c) either proceed against the owner or against the ship.

But not before the voyage begins. Stra. 695. See 12 Mod. 406. (b) Though in fact it be not employed accordingly, and the owner must take his remedy against the master. Noy, 95. 161, said to have been so lately agreed. — But *vide* Salk. 35. pl. 9. Id. Raym. 982. 6 Mod. 79. 11 Mod. 30. pl. 1. That the master cannot by his contract make the owners personally liable, although he may bind the ship, without which the master can have no credit abroad without such security by hypothecation.

Hob. 11.
Moor, 9:8.
Roll. Abr.
530.
(a) Or he
that is re-
puted mas-
ter. Noy, 95.
(c) 2 Sid.
6 Mod. 79.

But the master cannot sell the ship and broken tackle, though there is no probability of its being saved, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitants, who took away every thing that was cast upon the shore.

If a merchant's ship is taken by an (d) enemy, and a month after is retaken by an *English* ship, (e) the first owner (f) shall not have restitution, for the ship was gained by battle with an enemy.

Sid. 453.
per Hale,
Ch. Baron.

Vent. 174. (c) Where the property is not altered until the prize is brought *infra præfida* of that king, by whose subject it is taken. March. 110, 111. [(f) But the property is not completely veiled so as to bar the former owner, in favour of a rescuer or vendee, till there has been a sentence of condemnation in some, foreign or domestick, Admiralty court. 10 Mod. 79. 2 Burr. 694. 1208-9. Doug. 617. And it is usual in the prize acts to preserve the right of the original owner, even after condemnation, paying the salvage thereby fixed.]

2 Brownl.
11. West-
ton's case.
(d) Other-
wise if by a
pirate.

If two ships meet at sea together, though they went not forth conforts, and one of the ships in the presence of the other takes a prize, the other ship which was present shall have the moiety, for the presence of this ship was a terror to the ship taken.

2 Leon. 182.
per Curiam.

If an infant, being master of a ship at St. *Christopher's*, beyond sea, by contract with another, undertakes to carry certain goods from St. *Christopher's* to *England*, and there to deliver them according to the agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an infant; for this suit is but in nature of a detinue or trover and conversion at the common law.

Roll. Abr.
530. Furnes
and Smith
adjudged.

If goods are thrown over-board in stresses of weather, in danger or just fear of enemies, in order to save the ship and the rest of the cargo, that which is saved shall contribute to a proportion of that which is lost; and this average, which by the civil law and custom of merchants binds the owners, may be (g) pleaded to an action at common law.

Molloy,
246.

But average is not due, unless the goods are lost in such a manner that thereby the residue in the ship are saved; as if goods are thrown over-board to lighten the ship, or by composition part is given to a pirate to save the rest; but if a pirate takes part by violence, average shall not be paid for them.

(g) 2 Bulst.
290.
Moor, 297.

So,

Show. Parl.
Ca. 18, 19.

So, where *A.* being one of the owners of a ship, loaded on board her 210 tuns of oil, and *B.* loaded on board her 80 bales of silk upon a freight, by contract both to be delivered at *London*; the ship was pursued by enemies, and forced into an harbour, &c. and the master ordered the silk on shore, being the most valuable commodity, (though they lay under the oils, and took up a great deal of time to get at them,) the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; but in this case, as the loss of the oils did not save the silks, nor the saving of the silks lose the oils, the bill was dismissed.

Roll. Abr.
531. Cro.
Eliz. 685.
Noy, 24.
Hard. 473.
13 Co. 52.
2 Broaml.
26.

By the civil law the Admiralty court may take a recognizance in (a) nature of a stipulation from the defendant to answer the action; and if he does not obey, they may take his body; for it is necessary that every court should have a compulsory power of enforcing obedience to its decrees, and this course, having prevailed there time out of mind, cannot be altered without an act of parliament.

2 Inst. 51.
Yelv. 135.

Godb. 193. 260. (a) But being no court of record they cannot take a recognizance. 4 Inst. 135. 137 — Yet such a stipulation is good. Raym. 78. adjudged, [though in the form a recognizance. *Brymer v. Atkins*, 1 H. Bl. 164.]

Roll. Abr.
531.

(b) Raym.

78.

Keb. 489.

So, they may require *fidejussors* to enter into such stipulation, and such stipulation, if the practice has been so, may be good, though entered into (b) for a sum certain, and the bail taken in execution thereupon; and if they had not this power, the party might be obliged to lie in gaol during the whole suit.

13 Co. 53.
adjudged.

(c) But not
fine as

judges of a

court of re-

cord may do.

12 Co. 104.

—But they may fine and imprison for a contempt in the face of the court. Vent. 1.

(d) They may pu-

nish one that resists the execution of the process of the court, but not give damages to the party. Vent. 1.

But because they had no cognizance of the original matter, upon which the process was grounded, a prohibition was granted, &c. Style, 171. 340.

(e) But they can in no case take land in execution. Godb. 193. 260.

Said by Coke, that the process of the Admiralty court is to imprison according to 17 H. 6. *vide* Hard. 474. Noy, 24. Godb. 260. Sid. 148.

Though the court of Admiralty is no court of record, because they proceed there according to the civil law, yet by the custom of the court they may (c) amerce the defendant for his (d) default by their discretion, and may make execution for the same of the (e) goods of the defendant *in corpore com.* and if he hath no goods take his body.

Vent. 174.

(f) That

upon such

interlocu-

tory decree

no appeal

lies to the delegates. Vent. 174. [For this court, as well as the court of Chivalry, is governed by the civil law; and by that law, there can be no appeal, but where *gravamen est irreparabile*. Sir Henry Blount's case, 1 Atk. 235. *Vide* Moor, 814. *contr.*]

When a (f) provisionate decree, as they call it, or *primum decretum*, is given for the possession of a ship, and she is seised, upon security given by the course of the Admiralty she may be hired out.

(g) For in
such case no
writ of er-
ror lies.

By 8 Eliz. cap. 5. "A definitive sentence in a civil or marine cause, by delegates by commission upon an (g) appeal in Chancery, shall be final."

4 Inst. 135. 339. 341.

[It is only from the ordinary court of the Admiralty, that the appeal lies to the delegates. From the prize court the appeal is in pursuance of national conventions, to commissioned members of the privy council, called lords commissioners in prize causes.]

3 Bl. Com.
69.

Of the Marshalsea and Palace Court.

AT the time of the justiciar, the disputes between the king's servants were determined before the steward and marshal, and for that purpose the court was held within the king's verge, that his servants might not be drawn away from their attendance on him; the proceedings were by plaint without any original writ.

Fleta, lib. 2.
c. 3.
Spelm. tit.
Justic. Gen.

This court hath still a continuance, being holden in Southwark, and is a court of record, exercising a jurisdiction within twelve miles of the king's palace, or where his (a) ordinary residence is.

Crompt. Jur.
rif. 102.
2 Inst. 548.
4 Inst. 130.

13 R. 2. ft. 1. c. 3. 15 H. 6. c. 1. 33 H. 8. c. 12. (a) The king's going out of the household for his recreation is not such a removing as changes his ordinary residence. 10 Co. 74.

By 28 E. 1. cap. 3. called *Articuli super chart.* "The steward and marshal of the king's house shall not hold plea of freehold, neither of debt nor of covenant, nor of any contract, but only of debts and other things of the people of the same house, of contracts and covenants that one of the king's house shall have made with another of the same house, and in the same house, and of other (b) trespasses done within the verge."

For the construction hereof vide 2 Inst. 548. 10 Co. 71. The Marshaller's case. 6 Co. 20, 21. 4 Co. 46.

(b) Does not extend to trespasss *quare clausum fregit*, ejectment, for they cannot hold plea of any real or mixed action. 10 Co. 75.

In every action of debt or covenant, both the parties must be within the jurisdiction of the court: (c) also, the contract and consideration must be laid to have arisen within the jurisdiction; but in trespass it is said to be sufficient, if one of the parties be within the precincts or jurisdiction of the court.

6 Co. 20.
Michell-
born's case.
(c) Sid. 105.

King Charles the First, by letters patent, granted to the Marshalsea or palace-court, jurisdiction of holding plea of all manner of personal actions whatsoever, as debt, trespass, battery, slander, trover, actions on the case, which shall arise within twelve miles of the palace of Whitehall.

Vide Sid. 18c., where it seemed to Keeling that such letters patent were

void. [The court of the Marshalsea, and the palace court, though here treated of, and indeed very frequently confounded together, are in fact two distinct courts. The former is by prescription: the latter was erected by letters patent in the 6th year of King Charles the First: the former was originally holden before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestick servants. 1 Bulstr. 211. holding plea of all trespasses committed within the verge of the

the

the court, where only one of the parties was in the king's domestick service, 1 Sid. 105. and of all debts, contracts, and covenants, where both of the contracting parties belong to the royal household; Artic. sup. cart. 28 Edw. 1. c. 3. ft. 5 Edw. 3. c. 2. 10 Edw. 3. ft. 2. c. 2. The latter is to be holden before the steward of the household, and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of ail personal actions whatsoever, which shall arise between any parties within twelve miles of the palace at Whitehall. 1 Sid. 180. 2 Salk. 439. This court, therefore, is stationary, whereas the other is ambulatory, and obliged to follow the king in all his progresses, its verge extending for twelve miles round his majesty's place of residence. 13 R. 2. ft. 1. c. 3. Both of the courts are now holden together in the borough of Southwark once a week: and a writ of error lies from both to the court of King's Bench: the writ of error from the Marshal's court is allowed by the Statutes of 5 Edw. 3. c. 2. and 10 Edw. 3. ft. 2. c. 3. for as this tribunal was never subject to the jurisdiction of the chief justiciary, the writ of error, at common law, lay only to parliament. 2 Bulst. 217. 10 Co. 79. 3 Bl. Comm. 76.]

Courts Palatinate.

Cromp. Jurif. 137. **T**HE Palatinate courts are superior courts of record, which exercise a jurisdiction within their own precincts in as ample a manner as the courts of *Westminster*, into which the king's ordinary writs do not run; and although they have (b) *jura regalia*, yet they derive their authority (c) from the crown; but (d) at this day no palatinate jurisdiction can be erected without an act of parliament.

2 Inst. 557. (a) 4 Inst. 204. 213. — is a general court for all the subjects of the palatinate, and not merely for causes arising within the palatinate; and therefore if a debtor goes from a foreign into a palatinate jurisdiction, his obligations go along with him as much as if he removed from one kingdom into another, and he may be sued there, though the cause of action arose not within such palatinate jurisdiction. Sand. 74. Peacock and Best resolved. (b) Might formerly pardon treasons, murder, felonies, &c. but their power as to many things is now restrained, for which vide 4 Inst. 205. 27 H. 8. c. 24. (c) And were probably erected at first as being adjacent to those countries, which were generally in enmity with England, viz. That the people of Lancaster and Durham, which lie towards Scotland, and Chester that lies towards Wales, might have justice administered to them at home, and not be obliged to any attendance elsewhere, which might render them less able to defend themselves against their neighbours' incursions. Vent. 155. *Arguendo*. (d) Vide 4 Inst. 204. Cromp. Jurif. 139.

4 Inst. 205. By 27 H. 8. cap. 24. § 3. it is enacted, "That all original writs and judicial writs, and all manner of indictments of treason, felony, and trespass, and all manner of process to be made upon the same in every county palatine, and other liberty within this realm of *England* and *Wales*, shall be made only in the name of our sovereign lord the king, and his heirs, kings of *England*; and that every person or persons having such county palatine, or any other such liberty to make such originals, judicials, or other process of justice, shall make the *teste* in the said original writs and judicial in the name of that same person or persons that have such county palatine or liberty."

By 11 & 12 W. 3. cap. 9. reciting 22 and 23 Car. 2. cap. 9. and its reference to 43 Eliz. cap. 6. and that the clause, *That in actions*

actions of trespass, assault, and battery, and other personal actions, the plaintiff in such actions, in case the jury shall find the damages to be under the value of 40 s. shall not recover or obtain more costs of suit than the damage so found shall amount unto, relates only to the courts at *Westminster*, it is enacted, "That as well the said clause
 " and all the powers and provisions thereby, or by any other law
 " now in force, made for prevention of frivolous and vexatious
 " suits, commenced in the courts of *Westminster*, shall be extended
 " to, and be of the same force and efficacy in all such suits, to be
 " commenced or prosecuted in the court of great sessions for the
 " principality of *Wales*, the court of great sessions for the county
 " palatine of *Chester*, the court of common pleas for the county
 " palatine of *Lancaster*, and the court of pleas for the county
 " palatine of *Durham*, as fully and amply as if the said courts
 " had been mentioned therein."

And it is further enacted by the said last mentioned statute,
 " That no sheriff, or other officers within the said principality or
 " counties palatine, upon any writ or process issuing out of any of
 " his majesty's courts of record at *Westminster*, shall hold any
 " person to special bail unless an affidavit be first made in writ-
 " ing, and filed in that court, out of which such writ or process
 " is to issue, signifying the cause of action, and that the same is
 " 20 l. or upwards, and where the cause of action is 20 l. and
 " upwards, bail shall not be taken for more than the sum ex-
 " pressed in such affidavit."

*Vide Vol. 1.
 326.*

The palatinate courts are at this day three, viz. *Chester*, *Durham*, and *Lancaster*.

1. Of the County Palatine of *Chester*.

This is a county palatine by prescription, and according to my Lord *Coke* is the most ancient and honourable remaining at this day. *4 Inst. 212.
 Cromp. Ju-
 ris. 137.*

Within this county palatine, and the county of the city of *Chester*, there is and anciently hath been a principal officer called the Chamberlain of *Chester*, who hath, and time out of mind hath had, the jurisdiction of a chancellor; and the court of Exchequer at *Chester* is, and time out of mind hath been, the chancery court for the said county palatine, whereof the Chamberlain of *Chester* is judge in equity: he is also judge of matters at the common law within the said county, as in the court of Chancery at *Westminster*, for this court of Chancery is a mixt court. *4 Inst. 212.*

There is also, within the said county palatine, a justice for matters of the common pleas, and pleas of the crown, to be heard and determined within the said county palatine, commonly called the Chief Justice of *Chester*. *4 Inst. 212.*

All pleas of lands or tenements, and all other contracts, causes, and matters rising and growing within this county palatine are pleadable, and ought to be pleaded, heard, and judicially determined within the said county palatine, and not elsewhere; and if any be pleaded, heard, or judged out of the said county palatine,

(a) That this must be understood where the plaintiff by his declaration shews that the matter arose within a county palatine; for as to a transitory action, the plaintiff may allege that the cause of action accrued at any place. *Vide* Sid. 103. and *supra* of courts in general.

Roll. Abr. 374. Roll. Rep. 246. 3 Bull. 117. 12 Co. 113. 4 Inst. 213. A man cannot sue in the Chancery of *Chester* for a thing which in interest concerns the chancellor there, because he cannot be his own judge; and therefore he may in this case sue in the Chancery of *England*; for (b) otherwise there would be a failure of right.

S. P. (b) If a man hath cause to complain in equity of a matter arising within the county palatine of *Chester*; if the defendant lives out of the county palatine, he may be sued in the Chancery here; otherwise there would be a failure of justice; for proceeding in equity binding the person only, if the person lives out of the jurisdiction of the chamberlain of *Chester*, there can be no relief there. 4 Inst. 213. [In the case of *Edgworth v Davies*, 1 Ch. Caf. 41. it is stated to have been reported, upon view of precedents, that the jurisdiction of the counties palatine was allowable between parties dwelling in the same county, and for lands there, and for matters local.]

Fitz. Coro. 233. 12 E. 4. 16. D. Plit. 396. Vent. 157. 2 Sid. 146. Outlawry in a county palatine cannot be pleaded in any of the courts at *Westminster*, for the party outlawed is only ousted of his law within that jurisdiction, and it shall not extend to disable a man in another county, where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing the privileges of the law within that jurisdiction can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there; but it seems that outlawry in the county palatine of *Lancaster* may be pleaded in the courts of *Westminster*, because that county was erected by act of parliament in *Edward* the Third's time, but *Durham* and *Chester* are by prescription.

2. Of the County Palatine of *Durham*.

4 Inst. 216. Crompt. Jurisf. 138. Sec. 12 Mod. 181. This is also a county palatine by prescription, and said to have been erected soon after the conquest, and is parcel of the bishoprick of *Durham*.

Roll. Abr. 540. Roll. Rep. 397. The jurisdiction of the Bishop of *Durham* (c) extends to all places between *Tine* and *Tese*.

3 Bull. 156. S. P. (c) His jurisdiction extends as well to the manors of other men as to the demesnes of the bishop. Roll. Rep. 397. 3 Bull. 156.

4 Inst. 218. In this county palatine there is a court of Chancery, which is a mixed court both of law and equity, as the Chancery at *Westminster*.

4 Inst. 218. If an erroneous judgment be given, either in the Chancery upon a judgment there, according to the common law, or before the justices of the bishop, a writ of error shall be brought before the bishop himself; and if he give an erroneous judgment thereupon, a writ of error shall be sued returnable in the King's Bench.

2 Inst. 219, 220. If a man be surety for another to keep the peace, and, after he break the peace, and the surety have lands in the county palatine of *Durham*, the king shall command the bishop of *Durham*,

or

or his chancellor, to do execution; and so it is in the other counties palatine, and in the same manner it is of a statute staple, &c. recognizances, &c.

* The court of King's Bench will expect a return of a *latitat* to the county palatine of *Durham*.* 2 Stra. 1089. Andr. 191.

3. Of the County Palatine of *Lancaster*, and the Dutchy Court.

The county palatine and dutchy of *Lancaster* were erected by act of parliament in the reign of *Ed. 3*. 4 Inst. 204. Plow. 215. It does not

appear that this county palatine was erected by any statute in this reign; Edmund, son of Henry III. was Duke of Lancaster. It hath been a county palatine time out of mind. Crompt. Jurif. 137.

If lands, (a) parcel of the dutchy lie within the county palatine, a suit in equity may be for them in the dutchy court. Vent. 157. See 9 Mod. 95. Roll.

Abr. 539. (a) How the county palatine became parcel of the dutchy, *vide* 1 E. 4. c. 1. 1 H. 7. 4 Inst. 205. Vent. 155.

But if a man enters into an obligation concerning lands lying in the county palatine, and he is sued upon this at common law, he cannot sue in equity in the dutchy court to be relieved against this bond, for the jurisdiction being local, it cannot be extended to this collateral matter. Roll. Abr. 537. Holt's case. Hob. 77. S. C. adjudged; and a prohibition

awarded, because the dutchy hath no jurisdiction in respect of the person, as because the suitors dwell within the county palatine, nor upon the lands of the subject any where but upon the king's own land, and his own revenue, and perhaps upon bonds and assurances given for his revenue of the dutchy.

But it hath been since holden that a bill may be exhibited in the dutchy court, to be relieved against the forfeiture of a mortgage of lands lying within the county of *Lancaster*. Vent. 155. Fisher and Batten, 2 Lev. 24. 2 Keb. 826. S. C.

The proceedings of the dutchy court at *Westminster* are as in a court of (b) Chancery for lands, &c. within the (c) survey of the court by *Englisch* bill, &c. and decree, and the process the same as in Chancery; but it is not a mixed court, as the Chancery of *England* is, (d) partly of the common law, and partly of equity. 4 Inst. 206. (b) It doth not appear how this court of equity began, but it

would be inconvenient now to examine the power thereof after so long continuance, &c. 2 Lev. 24. (c) Whatever belongs to the jurisdiction of the dutchy may be determined in the Exchequer. Hard. 171. [or in the court of Chancery. 1 Ch. Rep. 55.] (d) They cannot try the validity of letters patent, or other matter properly triable at law. Roll. Rep. 42. 252. 3 Bull. 119. 12 Co. 114.

It was granted by patent, that this court might make ordinances for the hospital of *W.* how they *se gererent, conversarentur & eligerentur*, and this patent was confirmed by the statute of the 14 *Eliz.* yet it was resolved that the court hereby hath no power to determine the right of the possessions; and the hospital having exhibited a bill in this court to avoid a lease by them made, of lands lying out of the dutchy, a prohibition was granted. Roll. Rep. 42. Sir Thomas Beaumont and the Hospital of Wighton.

By the statute of 16 *Car. 1. cap. 10.*, reciting that the proceedings, censures, and decrees of the court of *Star-chamber* were found an intolerable burden to the subject, &c. it is enacted, "That the court of *Star-chamber* and all its power, jurisdiction,

“ used and exercised in the court of the dutchy of *Lancaster*, &c.
 “ is repealed, revoked, and made void.”

* By 4 *Geo.* 3. *cap.* 16. infants in counties palatine are enabled to convey by order of the respective courts belonging to the counties palatine*.

Of the Royal Franchise of Ely.

4 *Inst.* 220. **E**LY is (a) not a county palatine, but a royal franchise, granted
 (a) 2 *Inst.* 223. by *H.* 1. to the bishop of *Ely* and his successors, (b) of hear-
 Carth. 109. ing and determining as well civil as criminal pleas.
 So resolved. (b) This jurisdiction the bishop now exercises by his justices, by prescription grounded on the said grant. 4 *Inst.* 220. [The franchise is of much earlier date than the time of Henry the First. The bishoprick was founded by that prince in the tenth year of his reign, A. D. 1101, and immediately after, the grant here alluded to was made. But the franchise itself may be traced back to the seventh century, and Henry's charter refers to preceding grants, and declares that the church of *Ely* shall continue to have the same privileges and liberties as it had *die, quâ Edwardus vivus et mortuus fuit*. See Bentham's *Ely*, 46. Appendix, 23.]

Carth. 109. And therefore the party, who is sued in the courts of *West-*
 Cotton and *minster*, cannot plead that the lands lie, or that the cause of action
 Johnson, arose within *Ely*, but (c) consuance must be demanded, which is
 Salk. 183. pl. 1. S. C. all the jurisdiction a franchise hath.
 adjudged.

(c) Of the manner of demanding consuance, *vide* *Sid.* 283. *Keb.* 946. 948. [See the record in this case, Bentham's *Ely*, Appendix, 26. *Vide supra*, tit. *Courts and their Jurisdiction in general*, D. 3.]

4 *Inst.* 221. If one be bailiff of lands in *A.* and *B.*, and *B.* be within the
 (d) But if franchise of *Ely*, and *A.* not, the bailiff cannot be charged in (d)
 an action, a joint action, for this would oust the franchise of its jurisdiction.
 that in its nature is joint, rise partly within and partly without the franchise, the franchise cannot claim consuance. 4 *Inst.* 220.

Courts of the Forest.

Manwood,
 143.
 (e) The
 king only
 can make a
 forest, and

A Forest, as described by *Manwood*, is a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide there in the safe protection of the (e) king for his delight and pleasure,

pleasure, which territory of ground so privileged is meted and bounded with (a) unremoveable marks, meets, and boundaries, either known by matter of record, or by prescription, and also replenished (b) with wild beasts of venary or chase, and with great coverts of (c) vert for the succour of the said beasts there to abide; for the preservation and continuance of which place, together with the vert and venison, there are particular (d) officers, (e) laws, and privileges belonging to the same, requisite for that purpose, and proper only to a forest, and to no (f) other place.

therefore every forest must appear to be such by matter of record, or by prescription, which supposes a grant from the crown for that

purpose. Plow. 318. Bract. lib. 2. c. 1. 4 Inst. 300. Ero. Quo Warranto, 7.—But a subject may have a forest by grant from the crown. Dyer, 169. Manwood, 155.—Before the statute of *Charta de Foresta*, the king used to convert the open and woody grounds of his subjects into forests; but though at this day he may make a forest, yet he cannot afforest any of his subject's lands. 4 Inst. 300. (a) But need not be actually inclosed with hedge, ditch, &c. Manwood, 145. (b) Of the several beasts of the forest, vide 4 Inst. 316. (c) This word comprehends every thing bearing green leaves in the forest. Manwood, 146. (d) The chief of whom is the chief justice in eyre, who was formerly created by writ, as other justices in eyre; but by the statute 27 H. 8. c. 24. he is made by letters patent, and may execute his office by deputy. [The office is divided between two, one for the forests on this side of Trent, the other for those beyond.] 4 Inst. 291. 314.—The other officers are the rangers, stewards, verderors, foresters, regards, agitors, and woodwards; these must duly attend their respective offices, and therefore are privileged from attending on juries in the county, &c. F. N. B. 164. 2 Inst. 291. 1 Jon. 266. (e) Which differ in many cases from the common law of England, for which vide 4 Inst. 315. (f) For although warrens and parks are civil inclosures, and a chase is a franchise differing only from a park, in that it is not inclosed; and though these enjoy privileges by grant from the crown distinct from other lands, yet are they not to be considered as forest, having neither particular laws, nor particular officers; and, therefore, offences committed in these must be punished by the common law. 4 Inst. 308. Manwood, 49. Co. Lit. 233.

There are three courts (g) incident to a forest.

(g) Popph. 120. Roll. Rep. 191.

1. The Justice Seat.
2. The Swainmote Court.
3. The Court of Attachments.

1. Of the Justice Seat.

This court is so (h) incident to a forest, that there cannot be a forest without it, but it (i) cannot be holden oftner than every third year.

(h) 2 Bulst. 298.
(i) 4 Inst. 290.

It must be summoned at least 40 days before sitting, and one writ of summons shall be directed to the sheriff, &c. the other *custodi forestæ vel ejus locum tenenti*, to summon all officers, &c., and all persons that claim liberties within the forest, to shew how they claim them.

4 Inst. 291.

This court may inquire, hear, and determine all trespasses within the forest, (k) according to the law of the forest, and all claims of franchises, &c. within the forest.

4 Inst. 291.
(k) Whether a man may be impleaded

soned for non-payment of a fine set there, Webb's case, Roll. Rep. 411. 2 Bulst. 213. *dubatur*.

By the 7 R. 3. cap. 3. it is enacted, "That (l) no jury shall be compelled by any officer of the forest, or other person, to travel from place to place, out of the place where the charge is given, but shall give their verdict in the place where their charge is given."

[(l) In a *fiere facias* against the defendant, *quare non* satisfied a fine set upon

him at the justice seat in the forest of Deane, the plea was, that the justice was at Gloucester, which

is out of the forest; and thereupon it was demurred, because the beginning of the justice seat was at such a place within the forest, and adjoined to Gloucester. All the court held it good enough, although the justice seat were begun in a place out of the forest, and gave judgment for the king.] Roll. Abr. 534. Cro. Car. 409.

Jones, 168. The proceedings in this court are *de herá in heram*, and therefore the defendant must plead to an indictment there (a) presently.
(a) Where the indictment was removed in B. R., and the defendant there put to answer. 4 Inst. 295.

By 9 H. 3. cap. 2. "Dwellers out of forests shall not come before justices of the forest by common summons, unless empleaded there, or sureties for others attached for the forest."

By 34 E. 1. stat. 5. cap. 6. "The justice of the forest, or his lieutenant, in presence or by assent of the treasurer, may take fines and amercements of indicted for trespasses done there, and not tarry for the eyre of the justices."

4 Inst. 315. A felony committed within the forest must be inquired of, &c. before the judges of the common law, and it belongs not to the consueance of the chief justice of the forest.

4 Inst. 317. A receipt of an offender in hunting, &c., or of the king's venison, out of the forest, cannot be punished by the law of the forest, because the jurisdiction is local.

4 Inst. 290. This court may proceed upon the (b) presentments or verdicts in the swainmote.

By 9 H. 3. c. 16., Presentments of the foresters, when enrolled and enclosed under the seals of the verderors, shall be presented to the chief justices, &c. and be determined before them.——How the truth of such presentment shall be inquired of, and after by assent of the foresters, verderors, regards, &c. and confirmed and sealed with their seals, vide 34 E. 1. c. 1. And indictments taken in other manner shall be void.——And by 34 E. 1. stat. 5. c. 2. If any officer is dead, or sick, so that he cannot be at the swainmote, the justice of the forest shall put another in his place, so that the indictment may be by all, in form.——If sealed with the seal of one officer only, by assent of all the verderors, &c. it is well enough. Jones, 268.

Jones, 279. If, upon the first sitting of the justice seat, the four men and reeve of any town make default, the whole vill shall be amerced; but if after appearance they make default upon an adjournment, the defaulters only shall be amerced.

4 Inst. 290. If at the swainmote the presentment of the foresters concerning vert and venison is found true, the offender is convicted in law, and (c) cannot traverse; but a presentment at a justice seat (d) not found at the swainmote may be traversed, because presented but by one jury.
(c) Jones, 347.
(d) Nothing can be done but upon their presentments. 2 Bolls. 297.

4 Inst. 313. If the king pardons a trespass in a forest, and an offender at a justice seat pleads it, by the law of the forest, before any allowance thereof, the justices must charge the ministers of the forest to inquire whether the delinquent hath done any trespass in vert or venison since the date of the pardon, and when the pardon is allowed, the entry is *quod invenit manucaptors quodammodo non forisfac.* &c.

4 Inst. 313. If an offender be convicted for a trespass in the forest in hunting, &c. and adjudged to be fined or imprisoned, though he pays the fine, yet he must find sureties for his good abearing.

If a claim is allowed there which (a) ought not, the party grieved may, by *certiorari*, remove the record in *B. R.*, and thereupon have a *scire facias*, &c.
of the truth of such claims per ministros forestæ, or tam per ministros quam per alios, at his discretion.
 4 Inst. 294, 295.

But if refused to be allowed where it ought, the party shall have a writ *de libertatibus allocandis* to the justices of the forest. 4 Inst. 297.

But if upon such claim a difficulty arises, or a demurrer is joined, the chief justice may adjourn it in *B. R.*, &c. 4 Inst. 295.

A *certiorari* was prayed on behalf of the Duke of Norfolk, to remove a presentment taken in the forest of *Pickering*, to be directed to the chief justice in *eyre*; the judgment was, because there was a question of right, to whom certain woods there did belong, whether to the Duke of Norfolk, or to the Duke of Newcastle; and the Duke of Newcastle, being chief justice in *eyre*, would not let the woods be cut, to the prejudice of the Duke of Norfolk's right, but caused them to be presented; whereas in truth these woods had been deafforested: it was holden by the court, that in this case no *certiorari* should go, for the right of the woods is not in question; for a man (b) cannot cut his own woods to destroy the vert, but shall fine for it; and so the chief justice in *eyre* may be a judge for the king, though not for himself; and if it be deafforested, trespass lies, for the proceedings will be *coram non iudice*; but if they should be removed, there will be a failure of justice; for the *K. B.* cannot proceed to convict, not having their laws nor their officers; but after a conviction it may be otherwise.

The chief justice in *eyre* cannot, upon an information that such and such persons have killed does and felled trees in the forest, issue his warrant for apprehending such persons; for it is (c) expressly provided, that no man shall be taken or imprisoned by any officer of a forest without due indictment, or being taken with the (d) manner.
charged on a *habere corpus*. (c) As by 1 E. 3. c. 8. 7 R. 2. c. 4. & vide Reg. f. 8. (d) What shall be a taking in the manner, Carth. 77. & vide *post*.

Nor can any such warrant be directed to a messenger or other person that is not an officer of the forest; for herein the authority of the chief justice in *eyre*, and that of a justice of peace, is the same, who cannot direct his warrant to his servant, or any other person, but must direct it to the constable or parish officers; and the warrant *supra* being directed to a messenger, for this reason, principally, the persons were discharged.

2. Of the Swainmote Court.

The swainmote is holden by the steward before the verderors as judges, (e) thrice in the year, and the (f) foresters are to present their attachments at the next swainmote, where the freeholders within the forest are to appear to serve on juries.
appear there, vide 9 H. 3. c. 8. (f) 9 H. 3. c. 6.

- 4 Inst. 289. This court may inquire *de superoneratione forestarum & aliorum ministrorum forestæ & de eorum oppressionibus populo illat.*
 & vide
 34 E. 1.
 stat. 5. c. 4.
 4 Inst. 289. This court may not only inquire, but convict, but (a) not give judgment.
 (a) And therefore
 1 Swainmote without a justice seat is of no force at all. 2 Bulst. 298. per Coke.

3. Of the Court of Attachments.

- 4 Inst. 289. The court of attachments or woodmote court, is to be held before the verderors, every forty days; and at this court the foresters bring in their attachments *de viridi & venatione*, and the presentments thereof, and the verderors receive and enrol them: but no man ought to be attached by his body for vert or venison, unless taken with the (b) manner within the forest, else the attachment must be by his goods.
 (b) Taking in the manner, is when a man is taken in the very fact, or ready to do it, as with his bow bent, or ready to slip his dogs, or with his hands bloody; also taking upon a fresh pursuit, is a taking in the manner. Carth. 79. Agreed *per totam Curiam*.——But finding timber of the forest in a man's possession, as in his yard, is not a taking in the manner. Carth. 79., per three justices against the chief justice, who doubted.

[By some late acts of parliament for the punishment of deer-stealers, the accusations are to be judged and sentence is to be given in the ordinary tribunals.

- 2 Wils. 104. It is to be observed, that as the forest law is not the general law of the land, the king's courts are not bound to take notice of it, unless it be pleaded.]

Of the Sheriff's Torn.

- 2 Inst. 70. THE inhabitants of every county were formerly divided into
 71. decennaries, *i. e.* ten families living together in the same
 Bract. 124. precinct, the masters whereof were every one them mutually bound for each other, and punishable for the default of any member of any such family, in not appearing to answer for himself on any accusation made against him.
 Preface to Over every county an earl presided, and he, or the shire-reeve, arrayed the several persons within the county; and for this purpose the perambulation was through the county twice every year, and (c) if any person was found that had no compurgators, he was put into prison until he could procure some decennary to admit him: on the law-days the sheriff used to give in charge the several
 9 Co. articles
 2 Inst. 70.
 121.
 (c) Hence the stile of this court is
 Curia Visus

articles of the crown law, and if any person was guilty of the breach of any of them, he was delivered up by his compurgators. *Franci Ple-gii Domini Regis tenta*

apud C. coram vicecom. tent. in turro suo tali die, &c. But the law takes no notice of any such court, under the stile of *torn vicecom. tent. &c.* for the word *torn* does not properly signify the sheriff's court, but his perambulation. 2 Inst. 71. Dalt. Sheriff, 385. 391. Fitz. Leet, 11. 2 Hawk. P. C. c. 10. § 3.

But though the custom of the decennary be now worn away, yet the sheriff's torn still subsists, which is the king's court of record, holden before the sheriff, for the redressing of common grievances within the county, to which all persons, above the age of twelve years, not specially privileged, are bound to attend; not only to make proper inquiries, but to take the oaths of allegiance, &c. *Finch, 241. F.N.B. 82.*

But for the better understanding hereof I shall consider,

- (A) The Manner of holding this Court.
- (B) What Persons owe Suit to it.
- (C) In what Cases it has a Jurisdiction.
- (D) Of the Form of its Proceedings.

(A) The Manner of holding this Court.

BY the common law the sheriff might hold his torn at what place, and as often as he thought fit; but this proving inconvenient, in giving the sheriff too great a power of oppressing the subject, *6 H. 7. 1. b. Co. Lit. 115. cont.*

By the statute of *magna charta, cap. 35.*, it is enacted, "That no sheriff, or his bailiff, shall make his torn through a hundred but twice in a year, and at the place accustomed, viz. once after *Easter*, and again after the feast of *St. Michael*; and that the view of frankpledge shall be at the term of *St. Michael*."

Also, by the *31 E. 3. cap. 15.*, it is enacted, "That every sheriff shall make his torn yearly one time within the month after *Easter*, and another time within the month after *St. Michael*; and if they hold them in other manner, that then they shall lose their torn for the time."

It is agreed, that since these statutes, if the sheriff holds his torn at a different time, or at an unusual place, he may be indicted for it. *Dyer, 151. Keilw. 193. 2 Hawk. P. C. c. 10. § 6.*

Also, it hath been holden, that in every caption of an indictment taken in a sheriff's torn, or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a *Sunday*. *Vent. 107. 2 Sand. 290. 2 Keb. 751. 2 Hawk. P. C. c. 10. § 9.*

The sheriff is to hold his torn in each particular hundred; yet, as he has a jurisdiction in the whole county, he may receive pre-*[2 Hawk. P. C. c. 10. § 12.]* sentments

sentments in one hundred, of offences committed in another ; but the jury cannot be charged on oath to present any offences but those which arose within their particular hundreds. Also, by the statute of *Marlbridge*, cap. 10. it is provided, that those who have tenements in different hundreds, shall not be compelled to come to any torn, but only in the bailiwick wherein they shall be conversant.

(B) What Persons owe Suit to it.

2 Hawk.
P. C. c. 10.
§ 10.
(a) That court in their (b) proper persons.
ALL persons, as well masters as (a) servants, above the age of twelve years, are by the common law bound to appear at this court in their (b) proper persons.
every master may be amerced for suffering a servant to continue with him a year and a day without being put into the decennary. 41 E. 3. 26. b. 45 E. 3. 26. b. (b) And therefore no persons so bound to appear, are within the benefit of the statute of *Merton*, c. 10. which allows suit service to be performed by attorney. 2 Inst. 99.

F.N.B. 161.
2 Inst. 121.
2 Hawk.
P. C. c. 10.
§ 11.
But tenants in antient demesne are privileged by the common law from coming to this court, unless they and their ancestors have time out of mind used to come to it : also, parsons of churches have the like privilege by the common law, and all peers of the realm, and women have the same privilege by the statute of *Marlbridge*, 52 H. 3. cap. 10. unless their presence be required for some particular cause.

2 Hawk.
P. C. c. 10.
§ 12.
Also, by the common law, as well as the statute of *Marlbridge*, 52 H. 3. cap. 10., no one is bound to such suit to a torn, within the jurisdiction whereof he doth not reside.

2 Hawk.
P. C. ubi
supra.
(c) If one
have a house and family in two leets, he ought to do his suit to that wherein for the most part he personally resides. 2 Hawk. P. C. ubi supra.
And if a man has a house which stands within the precincts of (c) two leets, he shall do his suit to the court in whose jurisdiction his bed-chamber lies.

2 Hawk.
P. C. ubi
supra.
But no man can be of two leets ; and therefore one, who lives within a private leet, shall owe no suit to the torn or other leet, unless the private leet be seised into the king's hands, or unless the lord neglect to hold his court.

(C) In what Cases it has a Jurisdiction.

2 Hawk.
P. C. c. 10.
§ 50.
(d) Vide
2 Dan. 291.
Several statutes mentioned which give the sheriff's torn and court-leet jurisdiction. (e) Keilw. 66.
THE jurisdiction of the sheriff's torn is confined to offences at common law, and cannot take consueance of any crime made so by an act of parliament, unless (d) enabled to do so by the act itself ; (e) nor can it inquire of any offence, unless it arose since the holding of the last court.

Crompt.
Jurif. 12.
2 Hawk.
P. C. ubi supra.
All capital offences being of a publick nature, as (f) treasons, (g) felonies are properly inquirable of at the sheriff's torn.
(f) Except against the king's person. 9 H. 6. 44. — But 2 Hawk. P. C. ubi supra

supra *cent.*, and yet it seems strange, that the highest offence should be exempted; however, it is clear, that the sheriff has no power to inquire of any offence made treason by statute, as of a treason, but only as it was an offence at common law. (g) Except rape, because, as the law now stands, it is a felony only by statute. 2 Hawk. P. C. c. 10. § 51.—And except the death of a man, because no common nuisance. But *q. & vide* 2 Hawk. P. C. *ibid.*

It may inquire of assaults and batteries, if accompanied with bloodshed, but otherwise not; because without bloodshed they are not accounted common grievances. 2 Hawk. P. C. c. 10. § 53.

Also, it may inquire of all affrays, as being *in terrorem populi*. 2 Hawk. P. C. c. 10. § 54.

Also, it may inquire of the common breaking of hedges, dikes, or walls, and of all pound breaches, as being common grievances; also it may inquire generally of inferior offences, touching the king's interest, as of all purprestures or incroachments upon the king, and alienations in mortmain, and (a) seizures of treasure-trove, or of waifs or estrays, or wreck belonging to the king. *vide* 2 Hawk. P. C. c. 10. § 55, 57. and the several authorities there cited.

(a) But *q.* Whether it can preferbe to inquire of the seizure of such things belonging to the lord, being a subject. 2 Hawk. P. C. *ibid.*

It may inquire of all common nuisances, as all annoyances to common bridges, or highways, bawdy-houses, &c., and also, of all other such like offences, as selling corrupt victuals, breaking the assise of beer and ale, neglecting to hold a fair or market, keeping false weights or measures, &c. Also, it is said, that it may inquire of all common disturbers of the peace, as barrators, evendroppers, and of all common oppressors, as usurers, &c., and of all dangerous persons, as vagabonds, night-walkers, &c., and of all suitors to the court who shall make default, and of those who shall levy hue and cry without cause, or shall neglect to levy one where they ought, &c., and of the neglect of keeping a pair of stocks in any vill within the precinct, for which every such vill shall forfeit 5*l.* 2 Hawk. P. C. c. 10. § 58, 59. and the authorities there cited.

But a man cannot be amerced in a leet for furcharging a common, because this only concerns the private interest of the inhabitants. Roll. Abr. 541. 2 Roll. Abr. 83.

But it hath been holden, that (a) a by-law made at a leet, in pursuance of a custom to make such by-laws, that no one, under a certain penalty, shall receive a poor man to be his tenant, who afterwards shall become chargeable to the town, is good. Roll. Abr. 542. Lane, 55.

with the assent of the tenants, may make by-laws under certain penalties, in relation to matters properly cognizable by the court, as the reparation of highways, &c. But by-laws of a private nature are most proper for a court-baron. 2 Hawk. P. C. c. 10. § 62. (a) Of common right, any 1 et.

Although the above-mentioned offences are properly inquirable of in the sheriff's torn, yet is his power, as to the punishing of such offences, much restrained by several statutes; as by *magna charta*, cap. 17. which enacts, that no sheriff, constable, or (b) other bailiff of the king, shall hold pleas of the crown. 2 Hawk. P. C. c. 10. § 13. (b) As this statute has been construed to

extend to stewards of courts, neither the torn nor court-leet can deliver any persons indicted before them for felony, but must refer them to the justices of gaol-delivery. 2 Inst. 31. 2 Hawk. P. C. *ibid.*

2 Hawk.
P. C. c. 10.
§ 14.

But this statute of *magna charta* doth neither restrain the torn nor leet from taking indictments, or awarding procefs thereon as before; but this power of awarding such procefs is taken from the sheriff's torn, but not from courts-leet, by 1 E. 4. cap. 2.

(a) Not only the judge of the court is punishable for awarding such procefs, but also the officer for obeying it.
Jones, 301.
Cro. Car.
275.

By which it is enacted, "That on indictments and presentments before any of the king's sheriffs, in his counties, except in *London*, their under-sheriffs, clerks, bailiffs, or ministers, at their torns, or law-days, they nor any of them shall have (a) power to attach, arrest, or put in prison, or to levy or take any fine or amercement of any person so indicted or presented, by reason of any such indictment or presentment; but that the said sheriffs and under-sheriffs, clerks and bailiffs, and their ministers, shall deliver all such indictments and presentments to the justices of the peace at their next county sessions, on pain of 40*l.* and that the said justices of the peace shall have power to award procefs on all such indictments and presentments as the law doth require, and in like form as if the said indictments and presentments were taken before the said justices of peace; and also to arraign and deliver all such persons so indicted and presented before the said sheriffs, &c., and such persons which shall be indicted or presented of trespass, shall make such a fine as shall seem lawful by their discretions; and the estreats of the said fines and amercements shall be enrolled, and by indenture be delivered to the said sheriffs, under-sheriffs, their clerks, bailiffs, or ministers, or some of them, to the use and profit of him that was sheriff at the time of such indictments or presentments taken; and if any of the said sheriffs, their under-sheriffs, clerks, bailiffs, or their ministers, do arrest, attach, or put in prison, or cause any fine or ransom to be taken, or levy any amercement of any person or persons so indicted or presented, by reason or colour of any such indictment or presentment taken before them, at their terms or law-days above rehearsed, before that they have procefs from the said justices of peace, or estreats delivered out of the said indictments or presentments so brought, delivered, and presented to them; that then the sheriffs, which so do, shall forfeit an hundred pounds."

2 Hawk.
P. C. c. 10.
§ 13. 76.

It seems agreed, that, at this day, neither the torn nor leet have any power to try any person indicted before them, of any offence whatsoever, and that there is no remedy for such presentments as are traversable, but by removing them into the King's Bench.

2 Hawk.
P. C. c. 10.
§ 75.
3 Med. 138.
[b] A presentment is not traversable in a court leet; but in order to give the defendant an opportunity of

But a presentment by twelve or more, in a torn or leet, of any offence within the jurisdiction of the court, being neither capital, nor concerning freehold, subjects the party to a fine or amercement, without any farther proceeding, and binds him for ever, after the day on which it is found, and admits of no traverse (b); but if it concern life or freehold, as if it charge a man with not repairing a highway as he ought to do by the tenure of his lands, it may be removed into the King's Bench, and there traversed; but not if it barely charge his person, as for not cutting the branches of his trees hanging over the highway, &c., also it seems, that an indictment

dictment of an offence out of the jurisdiction of a leet, as of an affray done out of its precinct, is in like manner traversable. being heard, it may be removed by *certiorari* into the King's Bench, and there traversed. Rex v. Roupell, Cowp. 458. But the court will not grant a *certiorari* for such purpose, where the amercement has been estreated, and the fine paid. Rex v. Ripon, 2 Term Rep. 184.] — If a fine in a court-leet be unreasonable, it may be avoided by plea, and judgment of the court; for the judges are to determine the reasonableness of the fine. R. 11. Co. 44.

Also, notwithstanding the above-mentioned statutes, the sheriff may, at this day, impose a (a) fine on all such as shall be guilty of a contempt in the face of the court, and on a suitor refusing to be sworn, and on a bailiff refusing to make a panel, and on a tithingman refusing to make a presentment, and on a juryman refusing to present the articles given in charge, and on a person duly chosen constable, refusing to be sworn, but he (b) ought to fine each offender severally, and not all jointly, except where a vill is to be fined. 2 Hawk. P. C. c. 10. § 15. (a) Or may award an amercement at his discretion. 8 Co. 39. Dalt. Sheriff, 400. (b) 8 Co. 38. But for this *vide tit. Fines and Amercements.*

Also, on the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it, by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all; and the party having notice of such order, shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding; and every pain so forfeited may be recovered in like manner as a fine or amercement, by distress, or action of debt; neither shall it be assented to a less sum than was at first set. 2 Hawk. P. C. c. 10. § 21, &c. and several authorities there cited.

(D) Of the Form of its Proceedings.

IN making presentments, it is said to have been the course, formerly, to impanel, not only a grand jury, but also a jury of twelve men which was commonly called the petit jury, and to have offences first presented by the headboroughs, and the presentment affirmed by the petit jury, before they were brought to the grand jury. Keilw. 66. 141. 148. Dalt. Sheriff, 388. Comp. 212. 9H.6.44.b.

But however the practice might have been, it seems now agreed, that no exception can be taken to any such indictment, in respect of the non-observance of any such custom or usage; for that no averment lies against the acts of a court of record, and every judge of such court shall be presumed to act according to the rules of it. 2 Hawk. P. C. c. 10. § 70.

By *Westm. 2. 13 E. 1. cap. 13.* "The sheriff shall take no inquest (c) but by twelve men at the least, who shall put their seals thereto." (c) In the construction hereof, it hath been holden, that if there be more than twelve jurors, and all agree, all must put their seals, but that if twelve only agree, it is sufficient for those twelve to set their seals. Dalt. Sheriff, 329.

By *1 R. 3. cap. 4.* "No officer shall return or impanel any person on any inquiry in a (d) torn, but such as be of good name, and have freehold of 20 s. *per ann.* or copyhold of 26 s. *per ann.* (d) That a court leet seems not to be within "on

the equity of this statute, for it is said, that any person happening to be present at a leet, or riding by where it is holden, may, for want of jurors, be compelled to be sworn. 7 H. 6. 13. 12 H. 7. 18. b. Bro. Leet, 15.

By 1 E. 3. stat. 2. cap. 17., "Sheriffs, and all others who take indictments in their torns, or elsewhere, shall take them by roll indented, whereof the one part shall remain with the indictors, and the other with him that takes the inquest; so that the indictments shall not be embeziled as they had been in time past."

28 E. 3. c. 9.

But it must be observed, that what is above said, concerning indictments taken before the sheriff at his torn, is to be intended of such as are taken before him *ex officio*, for he is restrained to take them by virtue of any writ or commission, by 28 E. 3. cap. 9. which, reciting the mischiefs which had happened from commissions and general writs granted to sheriffs at their own suit, for their singular profit, enacteth, that no such commissions nor writs shall be granted.

Of the Court Leet.

Finch. 246. **A** Court-leet is a court of record, (a) having the same jurisdiction within some particular precinct, which the sheriff's torn hath in the county.
2 Hawk. P. C. c. 11. (a) And said to have been derived out of the torn, being a grant to certain lords for the ease of their tenants and residents within their manors, that they may have the array of them, and administer justice amongst them in their manors, &c. from whence came the duty in many leets *de certo letæ*, towards the charge of obtaining the grant of the leet; for the non-payment whereof, or default to present it, such grantees may prescribe to amerce the defaulters, and to distrain for the amercement; but they cannot so prescribe for any matter of a private nature. 2 Inst. 71. Jones, 283. 6 Co. 77. b. Dyer, 30. pl. 209. See 12 Mod. 598.

4 Inst. 261. The statute 18 E. 2. which shews of what things the sheriff's Crompt. Jur. torn and court-leet shall have consuance, (b) does not confine their jurisdiction to those particulars enumerated in the statute.
213. (b) That the leet may inquire of the same offences with the sheriff's torn, of which *vide tit. Sheriff's Torn, supra*.
— May inquire of corrupt victuals, as a common nuisance, though omitted in this statute. 4 Inst. 261. — That a railer is presentable there. Hob. 247. — So, a night-walker. Poph. 208. — Of the several statutes which empower this court to inquire, &c. *vide* 2 Dan 291. — That by the 31 Eliz. 5., they may inquire of user, of unlawful games, or of any art or mystery, not being brought up in it; but exercising a trade contrary to 5 Eliz. c. 4. is not within the act, nor presentable in the leet. Sid. 289. 2 Keb. 50. Raym. 154. S. C.

2 Hawk. P. C. c. 11. § 3, 4. and several au- No man can be within two leets at the same time, and in the same respect; therefore, he who resides within the precincts of a leet, the lord whereof doth duly hold his court, cannot be compelled

pelled to come to a superior leet, for any purpose which may as well be answered by his attendance at his own leet; but if a private leet be specially granted for two or three articles only, it seems that the inhabitants must attend the torn for all other matters: also, a grand leet may prescribe to oblige a certain number of inhabitants in every town within its precinct, to appear at every such grand leet, to inquire of such offences as were omitted by the inferior: also, if a leet be seized into the king's hands, all who owed suit to it ought to come to the torn, &c., also the sheriff's torn, as an overseer of the leet, is to inquire whether the tithings be full, and may inquire of the concealments of offences inquirable in leets.

A court-leet shall be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects, especially if often repeated, and without excuse. 2 Hawk. P. C. c. 11. § 5.

The caption of an indictment in a court-leet, *ad cur. vis. franc. pleg. cum cur. baron.*, &c. is good, for the words *cum cur. baron.* shall be rejected; for it shall be intended that that the indictment was taken by that court, which alone hath the colour of authority to take it. Salk. 195. Ld. Raym. 638.

The not setting forth in the caption, whether the court was holden by grant or prescription, is helped by the multitude of precedents. Salk. 200. Pl. 2. See 12 Mod. 400.

But the business of both the torn and leet hath declined many years, and is devolved on the quarter-sessions.

Of the County Court.

BY the escheat of earldoms and baronies, the tenants of such earls and barons were to hold from the king, and not being qualified to sit in the king's own court, they composed a court in each county, under the array of the sheriff, or the king's bailiff; those were the *pares* of the county court: and hence it is, that ever since it has been (a) held, that the sheriff is no judge, but only the suitors. Spelm. Rem. 50. 4 Inst. 266. (a) That suitors are judges. 2 Inst. 225. — Though the proceed. Mod. 171.

ings be upon a *justicies*. 2 Inst. 312. 6 Co. 11. b.

(b) This court is no court of (c) record, therefore an action of account against a receiver for 13s. and 4d. or other sum under 40s. lies not in the county court; for being no court of record it cannot assign auditors. 2 Inst. 380. 4 Inst. 266. (b) The stile of the court is *Curia prima*

comitat. E. C. milit. vic. com. prædict. tent. apud B. &c. 4 Inst. 266. (c) Therefore a writ of false judgment lies of a judgment there, and not a writ of error. 4 Inst. 266. — But in a red. stein the sheriff is made judge by the statute of *Morton*, c. 3. And a writ of error lieth of his judgment. 4 Inst. 266.

2 Inst. 312. It is a maxim of the common law, *quod placita de catallis, debitis, &c.*, (a) *quæ summam* (b) 40s. *atingunt vel excedunt secundum legem & consuetudinem Angliæ sine breve regis placitari non debent.* (a) though founded upon several contracts, each of which were under 40s. Vent. 65. (b) An entire debt, cannot be divided and sued for by several plaintiffs under 40s. 2 Inst. 312. But for this *vide* 2 Roll. Abr. 317. pl. 1. — If the plaintiff counts to his damages 40s. though the jury finds the damages under 40s. so that in truth the cause *de jure* belonged the court, yet he shall not have judgment. 2 Inst. 312.

2 Inst. 312. But by *justicies* this court may hold plea of goods, (c) debts, (c) Of debts *&c.*, of any value, and the process therein is an attachment of his goods, *&c.*, but no *capias*. *ex contractu*, but not of debts *ex delicto*, as upon the statute of tithes. Lev. 253. *dubitatur*.

2 Inst. 312. So, by force of a *justicies* it may hold plea of trespass *vi & armis*.

2 Inst. 139. In replevin, by writ or plaint upon the statute of *Marlbridge*, 312. this court may hold plea of goods and chattels above the value of 40s.

(d) So that this court hath no jurisdiction in such case; By the statute of *Gloucester*, made 6 E. 1. cap. 6. "Sheriffs shall plead pleas of trespass in their counties, as accustomed, *&c.*, (d) but for maims and wounds a man shall have his writ, as before hath been used." *secus*, of a battery without wounding or maiming. 2 Inst. 312. — But it cannot hold plea of any trespass *vi et armis*. Co. Lit. 118. 2 Lev. 93. Mod. 215.

And by the statute of 12 Geo. 2. cap. 13. § 7. "If any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the county court, who shall not be admitted an attorney or solicitor according to the act of 2 Geo. 2. cap. 23. he shall forfeit 20*l.* with costs, to him who shall sue, in any court of record."

Of the Hundred Court.

2 Inst. 71. (c) THIS court was, for the ease of the subject, by the king 4 Inst. 267. divided and derived from the county court, and hath the (c) Of the first division (f) same jurisdiction. of counties into hundreds, and of the grants of hundreds, *vide* 6 Co. 11. 9 Co. 25. 4 Co. 33. Dyer, 175. Reli. Rep. 118. Raym. 360 Vent. 399. 3 Mod. 199. (f) And therefore is no court of record. 4 Inst. 267. — Cannot hold plea of debt or trespass, where the debt or damages amount to 40s. Co. Lit. 118. — Nor of trespass *vi et armis*. Co. Lit. 118.

4 Inst. 267. Although the stile of this court is *curia E. C. militis hundredi sui de B. in com. Buck. tent. &c.*, *coram A. B., seneschallo ibidem*, yet the suitors are judges.

In an hundred court, the plea was laid to be *coram seneschallo & seclatoribus*; Serjeant Newdigate took an exception to it, that it should be laid to be held *coram seneschallo per seclatores*; but Wyndham, Atkins, and Scroggs thought it well enough; but the chief justice con., and cited the case of *Wyat and Wigges*, 4 Co. 47. where the coroner of the hostel and the coroner of the county took an indictment, where it did not appear that the party was killed within the verge; and resolved to be ill; for that there the record was entire, and it could not lie *coram non iudice*, as to the coroner of the hostel, and so void; and good as to the coroner of the county; and perhaps the jury, in their finding, were principally directed by the coroner of the hostel; so it might be here, for they in the hundred court may be swayed principally by what the steward said. Another objection was, that the first process was an (a) attachment; but as the defendant appeared, the court said that fault was cured; so judgment was affirmed.

The true process of this court at common law is a *distingas*, but by custom the process may be (b) a *levari facias*; and it is said, that most hundred courts have this custom.

be in the hundred court by *levari facias*; and therefore where the books speak of a *distingas*, they must be intended of a *levari*, for a distress infinite would be endless in an execution. 2 Lev. 81. 2 Keb. 117. 126. Vide Carth. 54. — And for the manner of setting forth a judgment in this court, vide also Carth. 53, 54. 2 Lutw. 1369. 3 Lev. 403.

If a jury in an hundred, or other inferior court, will not agree on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the steward may from time to time adjourn the court till they do agree.

Pasch.
30 Car. 2.
Clever and
Curteis.

(a) That the court of King's Bench daily grants attachments against stewards of hundred courts, for granting attachments against all the parties' goods.

Salk. 207.
pl. 4.

Salk. 201.

pl. 3.
(b) An execution may

2 Lev. 81.

Salk. 207.
pl. 3.

Of the Court Baron.

THIS court is (c) incident to every manor, and had (d) anti-ently consueance of all pleas of land within the manor, so that no person within the manor could apply to any other jurisdiction without a *remisit curiam* from the lord.

and was at first instituted for the ease of the tenants, for ending controversies where the debt or damage was under 40 s. at home, &c. 4 Inst. 268. Owen, 35. Brownl. 175. Bulst. 55. (d) But at this day is no court of record, nor can it hold plea of debt or trespass, where the debt or damage amounts to 40 s. Co. Lit. 118. 2 Inst. 311. — Nor of trespass *vi et armis*, because it cannot impose a fine. Co. Lit. 118. 2 Inst. 311, 312.

The suitors are (e) judges, and the (f) steward but as a registrar.

4 Inst. 268. S. P. [4 Term Rep. 446. S. P.]. (e) Though the plea there is held upon a writ of right. 6 Co. 11. b. 12. a. 4 Inst. 268. (f) And a man cannot prescribe to hold a court-baron before

4 Inst. 264.
4 Co. 33.
Co. Lit. 58.

(c) That it is incident to a manor,

(d) But at this day is no court of record, nor can it hold plea of debt or damage amounts to 40 s. Co. Lit. 118. 2 Inst. 311.

6 H. 4. pl. 3.
Co. Lit. 58.
4 Co. 33. b.

(e) Though the plea there is held upon a writ of right. 6 Co. 11. b. 12. a. 4 Inst. 268. (f) And a man cannot prescribe to hold a court-baron before

fore his steward, but before suitors. Cro. Jac. 582. adjudged. See Mod. 173. Cro. Eliz. 792. Noy, 20. Godb. 49.—But perhaps may prescribe to hold a court before his steward, but not a court-baron. Cro. Jac. 582. Leon. 316. Brownl. 21. Noy, 20. 2 Jones, 23. Godb. 68.—A court-baron being incident to a manor of common right cannot be prescribed for. Cro. Eliz. 792. adjudged. Noy, 20. adjudged.

4 Inst. 268. The stile of this court is (a) *curia barones E. C. militis manerii* (a) My Lord *sui predicti* (having the manor's name written in the margin) *tent.* Coke says, he hath seen *tali die coram A. B. seneschallo ibidem, &c.* court rolls in the reign of Edw. 1. (having the name of the manors in the margin) filed thus, *Aula ibidem tent. tali die, &c.* because it was holden in the hall of the manor. 4 Inst. 268.

Co. Lit. 58. a. This court cannot be holden out of the manor; but if a man be lord of two or three manors, and there be a custom to hold a court at one for them all, such courts are by custom good.

Co. Lit. 58. (b) Note: The court of King's Bench has granted informations against lords and stewards for oppressing the tenants, by warning courts-baron every three weeks, and distraining them to appear, or pay a certain sum of money, upon no occasions at all, but to extort amercements from them. (c) For this *vide* 4 Co. 27. Cro. Car. 366. Jones, 342.

(d) For the exposition thereof, *vide* 2 Inst. 39. By *magna charta*, (d) cap. 24. “A *præcipe in capite* is not to be granted, whereby any freeman may lose his court.”

(e) The king bound hereby in his court-baron, hundred, or county court. 2 Inst. 143. (f) Intended between party and party, for to inquire for the lord of all the articles belonging to the court-baron or hundred, they may be sworn. 2 Inst. 142. For which articles *vide* statute 4 Edw. intituled *extenta manerii*. (g) In a writ of right patent, wherein plea is held of freehold, the court may give an oath, for the writ is *mandatum regis*. 2 Inst. 143.

4 Inst. 143. All pleas in a court-baron, of common right, and by course of law, are determinable by wager of law; but by prescription they may be determined by jury.

4 H. 6. 17. If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they may distrain him, and retain the distress till satisfaction.

543. Bro. Court-Baron, 6. S. C. But a *quare* made, for it is usual for the suitors, assigned by the steward, to tax the sums, and then to award a *levari facias*. *Quære*, If by custom, or common law? See 12 Mod. 124.—By Brownl. 81. Upon a *levari* out of a court-baron, goods cannot be sold without a custom to sell, &c., & *vide* Noy, 17.

Yelv. 194. Gomefal and Medgate, adjudged. Cro. Jac. 255. Bulst. 52. S. C. adjudged. If in a court-baron the defendant appears not upon the distress, yet the goods distrained are not forfeited, nor can be sold by the bailiff, for the distress is but in nature of a pledge; and though by the course of the common law, where a man is attached by his goods, and appears not, they are forfeited; yet in a court-baron no (b) attachment lies, but a distress infinite only.

(b) The process in a court-baron is summons, attachment, and distress infinite. 2 Roll. Rep. 493, & *vide* Bulst. 53.

Courts of the Cinque Ports.

THE cinque ports are (a) ancient trading towns lying towards the sea coasts; these held *per baroniam*, and were represented in parliament by the lord warden or keeper of the cinque ports; but they did not hold by the tenure of knight-service, only by sending ships to sea, &c., and as they were instituted for the defence and safety of the kingdom, they had several (b) liberties and privileges granted them, in respect of their necessary attendance in those ports.

ports were but three, viz. Dover, Sandwich, and Romney; but Hastings and Hithe were added by William the Conqueror. 4 Inst. 222.—To which Winchelsea and Rye were adjoined; these now send each of them their representatives to parliament; and though seven in number, are still called cinque ports. 2 Inst. 556. 4 Inst. 222. (b) To which they have a lawful title, confirmed by *magna charta*, c. 9. in these words, *Barones de quinque portibus & omnes alii portus habeant omnes libertates & liberas consuetudines suas.* 2 Inst. 20.—But this confirmation does not extend to pleas of the crown, with which they intermeddle as justices of the peace. Cro. Car. 253.

There are several courts within the cinque ports; one before the constable of the castle of Dover; others within the ports themselves, before the mayors and jurats; (c) another which is called *curia quinque portuum apud Shepway*.

that nobody knows where this court is,

There is a court of Chancery in the cinque ports, but no original writs issue thence, but it serves only to decide (d) matters of equity.

said the great use of their Chancery is to relieve against errors in proceedings at law, which they used to indorse upon the bill.

The lord warden hath two jurisdictions, 1. The (e) authority of an admiral, to hold plea by bill concerning the guard of the castle, &c. according to the course of the common law.

of England; which jurisdiction is saved to him in several acts of parliament, as 2 H. 5. stat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. & vide 2 Jon. 66, 67. Chan. Ca. 305.

By 28 Edw. 1. cap. 7. "The (f) constable of the castle of Dover shall not hold plea of a foreign county within the castle gate, except it touch the keeping of the castle; nor distrain the inhabitants of the cinque ports, elsewhere or otherwise than they ought after the form of their charter for their old franchises, confirmed by *magna charta*."

The mayors and jurats of the several cinque ports have power to hold plea, &c., and (g) upon their judgment no writ of error lies in B. R. but they are examinable by bill in nature of a writ of error, *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*.

of the court of Shepway. Sid. 356. Per Twifden; and so are the books which speak error to the cinque ports to be intended.

Braet. lib. 3. f. 118. 4 Inst. 222. (a) For ancient records touching the cinque ports, vide 2 Inst. 558.—At first the privileged

4 Inst. 223. (c) Sid. 166. It is said by Twifden,

Sid. 166. *per curiam.* (d) Sid. 356. It is

2 Inst. 556. (e) Exempt from the admiralty

(f) Who is always warden of the five ports. 2 Inst. 556.

2 Inst. 557. Dyer, 376. 4 Inst. 224. S. P.

(g) Secus, upon the judgment of a writ of

4 Inst. 224. The jurisdiction of the cinque ports is general, as well as to (a) personal as (b) real and mixed actions.

(a) Otherwise in debt, or trespass transitory. Cro. Eliz. 910.—Where a stranger comes within the cinque ports, and does a transitory trespass, and after goes out of their jurisdiction, he to whom the trespass was done may have an action at common law, else he would be without remedy; for they can call none in who are out of their jurisdiction, and the privileges were granted for the ease and benefit, and not the prejudice, of the inhabitants. Yelv. 12. 2 Inst. 557. (b) And they hold plea of freehold by plaintiff. Sid. 166. But a judgment in B. R. for lands there shall bind for ever, though such judgment for lands in Wales, or a county palatine, is merely void. 2 Inst. 557. 4 Inst. 223. Bro. Cinque Ports, 24. Q.—That they cannot plead to the jurisdiction of the court of *Westminster*, but must demand consuance. 4 Inst. 224.—Also, if an ejectment on a feigned lease be brought of lands within the cinque ports, the courts of *Westminster* will not allow the tenant of the lands, on his prayer, to be made defendant, to plead to the jurisdiction of these courts, but will tie him strictly to the rules of confessing lease, entry, and ouster, and pleading not guilty; this is not like the case of ancient demesne, where a recovery in the courts above makes the lands frankfee for ever.

2 Inst. 557. If a man is murdered in any of the cinque ports, his wife may have an appeal against the murderer, (c) directed to the sheriff of the county, and he shall execute the writ (d) within the cinque ports, for the constable hath no jurisdiction to hold plea thereof.

Said to have been resolved between Waes and Braines. Cro. Eliz. 694. S. C. adjudged. (c) Because the king in a manner is concerned; for if the plaintiff is nonsuit, the defendant shall be arraigned at his suit. Yelv. 13. Cro. Eliz. 911. (d) Yet in Yelv. 13. per Poph. If the defendant at all times after continued within the cinque ports, so that he might be proceeded against there, no appeal would lie elsewhere.

2 Inst. 557. So, if the defendant is *in custodia marescalli*, the appeal may be against him by bill. Cro. Eliz. 695. 778.

4 Inst. 223. If a man hath judgment in any of the king's courts, and the defendant hath no lands or goods but in the cinque ports, the plaintiff may have (e) a writ to the lord warden to make execution.

(e) The record must be certified into Chancery, and from thence by *mittimus* to the lord warden to make execution. And. 28. 3 Leon. 3. W. Bendl. 46.

Cro. Jac. 543. Palm. 96. S. C. adjudged. If a man is imprisoned at *Dover* by the lord warden, an (f) *habeas* (g) *corpus* (h) may issue to the lord warden, &c., for the privilege, that the king's writ runs not, must be intended between (i) party and party, for there can be no such privilege against the king.

(f) Where a prohibition, *mandamus*, &c. Cro. Car. 543. Palm. 55. Sid. 355. 4 Inst. 223. 2 Lev. 86. 3 Keb. 598. Hard. 475.—Where a *certiorari*, vide Roll. Abr. 395. 2 Hawk. P. C. c. 27. § 24. (g) *Ad faciendum & recipiendum*; but if *ad respondendum* a private person, Q. Mod. 20. 8 Mod. 22. 12 Mod. 666. (h) But Sid. 166., it was said by some, that it had scarce ever been known that a prohibition or *habeas corpus* went to the cinque ports. [But there can be no doubt, but that they will go there.] (i) A *quo minus* lieth thither. Hard. 475.

2 Inst. 557. The (k) lord warden is the immediate officer of the court, and (l) writs shall be directed to him (m) as in all real actions, &c., for lands within the five ports.

(k) The constable or keeper of *Dover Castle* is also warden of the cinque ports, and the writs directed to him are, Rex, &c. *constabulario castri sui de Dover & custodi quinque portuum*, &c. 2 Inst. 556. 4 Inst. 223. (l) But writs of appeal must be directed to the sheriff. Cro. Eliz. 604. Because the king is in a manner concerned. Vide Yelv. 13. Cro. Eliz. 911. 2 Inst. 557. (m) But if there be an indictment before justices of peace within the cinque ports, a *certiorari* may be immediately directed to them; for they proceed by virtue of their commission, and not their ancient charters, &c. Cro. Car. 253, 254. but for this, vide Roll. Abr. 395.

By the 2 *W. & M. cap. 7.* "Whereas the late lord wardens claimed a right of nomination of one person to each of the cinque ports, the two ancient towns, and their members, whom they ought to elect to serve in parliament; it is declared and enacted, that all such nominations were and are against law, and void."

If a murder is committed at *Sandwich*, and an appeal brought by original in *B. R.*, directed to the sheriff of the county of *Kent*, and he brings in the defendant, who pleads that *Sandwich* is part of the cinque ports, *ubi breve domini regis non currit, &c.*, and demands judgment of the writ, this is a bad plea; for the defendant having done the murder within the cinque ports, and after flying out, if this pleading should be allowed, (a) there would be a failure of justice.

proclaimed in open county. *Cro. Eliz. 910.*

But if the defendant by his plea shews that at the time of the murder supposed, and at all times after, he had been an inhabitant, and commorant within the cinque ports, and so had given jurisdiction to the judges there, and shewed they might have proceeded, &c., it would be a good plea.

Yelv. 12, 13.
Cro. Eliz. 910. S. C.
(a) For the cinque ports cannot award process of outlawry, for that ought to be

Yelv. 13.

Of the Courts of the Stannaries.

THESE courts were (b) instituted for the conveniency of tinners, that they might be encouraged in the making of tin, one of the staple commodities of the kingdom; and therefore in *Cornwall* and *Devonshire*, where the ore or mine of which it is made chiefly abounds, the workers herein were allowed the privilege of suing and being sued in those places.

ries, and for an exposition of the charter of E. 1. and the statute 50 E. 3. which gave great privileges to the tinners, *vide* 4 *Inft.* 232., 12 *Co.* 10, 11., *Plow.* 327., *Roll. Abr.* 547, 548.; & *vide* 16 *Car.* 1. c. 15. by which their privileges are declared and circumscribed.

4 *Inft.* 229.
(b) For ancient charters, records, and acts of parliament concerning the stannaries.

The jurisdiction of the (c) court is guided by special laws, by customs, and by prescription time out of mind.

court, *vide* 4 *Inft.* 299.—And that the lord warden hath jurisdiction of all the tin in *Cornwall* and *Devon.* 4 *Inft.* 229.

4 *Inft.* 229.
(c) For the style of the

No writ of error lies upon (d) any judgment in these courts; but the party grieved must be relieved by appeal in several degrees; first to the steward of the stannary court, where the matter lies; then to the under-warden of the stannaries; and from him to the

4 *Inft.* 230.
[3 *Bulstr.* 183. *Dodridge's Hist.* of *Cornw.* 54.] (d) For

any matters touching the stannaries; otherwise, upon a judgment there given upon collateral matters. 3 Bulst. 183. Per Coke, Ch. Justice, said to have been so resolved upon a conference by all the judges, as is to be seen recorded in Chancery in the petit-bag office, Q. Ow. S. Sid. 233.

4 Inst. 231. Blowers, and all other labourers and workers, without fraud or covin, in and about the stannaries in *Cornwall* and *Devon*, have the privilege of the stannaries during the time they work there.

vide 2 Roll. Rep. 44. and the statute 16 Car. 1. c. 15.

4 Inst. 231. All matters concerning the stannaries, or depending thereupon, are to be heard and determined (a) according to the custom of the same time out of mind used.

(a) But *vide* Cro. Car. 333.

4 Inst. 231. Transitory actions between tinner and tinner, or worker and worker, though not concerning the stannaries, nor arising therein, if the defendant be found within the stannaries, may be brought in these courts, or at common law.

4 Inst. 231. But if one party only be a tinner or worker, such transitory actions which concern not the stannaries, nor arise therein, cannot be brought there, and in such case the defendant by the custom and usage of that court may plead to the jurisdiction, and (b) ought not to be arrested *cundo* to swear it, or *redeundo*.

But it was said by the chief justice, that after the oath taken they will for 3d. enter the plaintiff a tinner.

4 Inst. 231. There ought to be no demurrer in those courts for want of form, but for matter of substance only.

4 Inst. 231. They have no jurisdiction of (c) any local action arising out of the stannaries, and (d) matters of life, member and plea of land, are expressly excepted out of their charters.

(c) That the plaintiff must shew that he was a tinner, and that the court was held within the jurisdiction of the stannaries. Farell. 103. (d) They have no court of equity, and therefore a suit concerning an agreement relating to mines, &c. proper here. 2 Vern. 483, 484.

[See further upon this subject *Pearce's Laws and Customs of the Stannaries.*]

Of the Court of Commissioners of Sewers.

BY the (a) common law the king used to grant commissions for inquiring into the want of reparations of sea walls, ditches, gutters, sewers, &c. (a) Reg. 127. F. N. B. 113. 4 Inst. 276.

But as these matters are now to be regulated according to (b) several acts of parliament, it will be necessary to set down the purport of such as are mostly in use at this day. (b) As Mag-na Charta, c. 15, 16. 23. For c. 5. 9 H. 6. which vide 2 Inst. 29, 30. 25 E. 3. c. 4. 45 E. 3. c. 2. 1 H. 4. c. 12. 6 H. 6. c. 5. 18 H. 6. c. 10. 23 H. 6. c. 9. 12 E. 4. c. 6. 4 H. 7. c. 1. 6 H. 8. c. 10.

The chief statute relating hereto, is 23 H. 8. cap. 5. which ordains that the lord chancellor, treasurer, the two chief justices for the time being, or any three of them, whereof the lord chancellor to be one, shall, as often as need be, direct commissions, and appoint commissioners; the form of which commission is set forth in the statute, which fully declares the duty and authority of the said commissioners, viz. That they do inquire by the oaths of the honest and lawful men, &c., through whose default the hurts and damages have happened, &c., and who hath or holdeth any lands or tenements, &c., or hath or may have any hurt, loss, or disadvantage, &c., and all these persons and every of them to tax, &c., and to make and ordain statutes, ordinances, &c., after the laws and customs of *Rumney Marsh* in the county of *Kent*, or otherwise after their own wisdoms and discretions. 23 H. 8. c. 5. Which vide at large, made perpetual by 3 & 4 E. 6. c. 8. and vide 1 M. § 3. c. 11. This statute to extend to Glamorgan, &c.

The 25 H. 8. cap. 10. enacts, "That no person shall be compelled to take upon him the execution of any such commission, unless he be a dweller in the county wherein he is appointed commissioner; also that every person refusing to take the oath of commissioner, as appointed by 23 H. 8. cap. 5. shall, as often as such refusal shall be certified into Chancery, forfeit five marks." 25 H. 8. c. 10.

"The 3 & 4 E. 6. cap. 6. directs in what manner the king's lands shall be liable, and taxed by the commissioners, and his tenants discharged and indemnified in their payments of such taxes, and that every such commission shall be in force for five years from the teste, unless superseded." 3 & 4 E. 6. c. 6.

"By the 13 Eliz. cap. 9. all commissions of sewers shall continue in force for 10 years after the date thereof, unless they be repealed by a new commission or *superfedeas*; also by this statute all laws, ordinances, and constitutions duly made, according to the statute 23 H. 8. cap. 5. and written in parchment, indent-

“ ed under the seals of the commissioners, or six of them, (whereof
 “ one part shall remain with the clerk of the commission, and the
 “ other in such place as the commissioners or six of them shall
 “ appoint,) shall without any certificate to be made into the
 “ Chancery, and without the king’s assent, continue in force, not-
 “ withstanding any determination of such commission by *super-*
 “ *fedeas*, until the same laws, ordinances, and constitutions shall
 “ be altered, repealed, or made void by commissioners afterwards
 “ assigned: also, by this act there shall be no certificate or return
 “ of the commission, or of any of their laws, ordinances, or
 “ doings by virtue thereof.”

3 Jac. 1.
 c. 14. *U*
vide 7 Ann.
 c. 9. By
 which power
 is given to
 the lord
 mayor of London to appoint commissioners.

“ By 3 Jac. 1. cap. 14., all walls, ditches, banks, gutters, sewers,
 “ gates, causeways, bridges, streams, and water-courses within
 “ two miles of *London*, having their fall into *Thames*, shall be sub-
 “ ject to the commission of sewers, and to all statutes made for
 “ sewers, and to all penalties in the said statutes contained.”

7 Ann.
 c. 10.

By the 7 Ann. cap. 10. reciting the power of the commissioners
 by former statutes, as to selling the lands of those who refused to
 pay the taxes and proportions with which they were charged, and
 that these laws did not extend to copyhold lands, it is enacted,
 that the commissioners shall have the like power as to copyhold
 lands, and that the lords of such copyholds shall admit the ven-
 dees, &c. Also, by this act it is enacted, that it may be lawful
 for the commissioners by warrant to authorize any person to levy
 the sums of money assessed upon the lands, &c., by distress and
 sale of the goods of the party refusing, returning the overplus.

4 Inst. 276.

Notwithstanding the ample powers by the above-mentioned
 statutes given to the commissioners of sewers, yet are their pro-
 ceedings still examinable in the courts above, and accordingly we
 find several resolutions in which their proceedings and sentences
 have been controuled by the courts at *Westminster*.

5 Co. 99. b.
 Rook’s
 case.

As where the commissioners, on the finding of a jury that *J. S.*
 had seven acres of land next adjoining to a bank on the river *Thames*,
 and that the occupiers of those seven acres used to repair, but that
 there were besides 800 acres within the same level liable to be fur-
 rounded, having taxed each of the seven acres at 8s. it was held;
 1st, That the finding that the occupiers of these seven acres used
 to repair, was not material, because that such occupiers might
 have been tenants at will, whose acts could not bind him who had
 the inheritance. 2^{dly}, That though these seven acres lay next the
 bank, yet ought the commissioners to tax all those lands which
 were in danger of being damaged by the overflowing of the
 waters, and consequently received benefit by the repairs; for
 though they are to act (a) according to their discretion, yet such
 discretion must be governed and directed by the rules of law and
 reason.

(a) Hard.
 146.

(b) *Vide*
 10 Co. 137,
 138.
 13 Co. 35.

The commissioners of sewers cannot make any (b) new inven-
 tions to charge the people; (c) but if there were an old wall, they
 may build another (if that be decayed) on the inside, or some small
 way

way distant, if it be necessary, and may compel them that repaired the former to repair it, if they have no damage by the remove.

If one be bound by prescription to repair a bank, which by sudden violence, and without the default of him who is so bound to repair, is thrown down, the commissioners are not to charge him only with the repair, but ought to tax all others according to the advantages accruing to them from such repairs.

The commissioners of sewers cannot tax a whole township, but must proportion each man's share according to the quantity of his land, &c., and, therefore, where the commissioners assessed a fine on the village of *D.*, and by their warrant ordered it to be levied on *J. S.*, whose cattle being distrained, he brought his action, and had judgment; and afterwards the said *J. S.* refusing to release the judgment, he was committed by the commissioners; but upon complaint thereof the court of King's Bench committed and fined the commissioners, and held that by such proceedings after a judgment at law, they were guilty of a *præmunire*.

It has been holden, that, though the commissioners of sewers are not a court of record, and may thus commit for a contempt; yet that must be understood of a contempt in the face of their court, and not to imprison a person for disobeying their orders.

There was a complaint of the inhabitants of *Whitechapel* at the council-board, that the commissioners of sewers had taxed the said inhabitants for a repair of a sewer in *Wapping*, whereas they were not within the level; thereupon the council ordered a *certiorari* out of *B. R.*, and that the matter in question should be tried there; which was accordingly done, and the *certiorari* delivered; notwithstanding which they issued out their warrants for putting the orders in execution, and the officers refusing to execute the same were fined 10*l.* a man; thereupon a second *certiorari* was delivered to return all proceedings and all orders, &c. concerning the same; this being also disobeyed, and new orders made for fining some of their officers for their contempt; whereupon they appeared, and though they alleged the advice of counsel in what they did, yet they were committed for the contempt; the next day the return was brought into court, and upon the several *certioraris* the returns were several, which the court disallowed, and ordered them to return all their proceedings upon the return of the first writ, and to return upon the last, that *ante adventum brevis* they had returned the whole matter, which was accordingly done, and filed; and after they continued a week in prison without bail, they were fined 40 marks a piece, and discharged, and the matter ordered to be tried at the *B. R.* It was here moved in behalf of some of the commissioners, that these orders, whereby the contempt of the commissioners appeared, though they were returned, might not be filed upon a clause in 13 *Eliz. cap. 9.* which excuses them from returning their orders, and exempts them from penalties; but it was resolved that that, and other provisos in the same statute, did only extend to the court of Chancery, to abridge the power which the court of Chancery had over the said commissioners, and the

Moor, 82*g.*
Sid. 145.
(c) 2 *Keb.*
129.

10 *Co.* 139.
Keighley's
case, 5 *Co.*
100. a. *S. P.*

2 *Bull.* 197.
Cro. Jac.
336. *S. P.*
3 *Inst.* 125.
S. P.

Sid. 145.

Lev. 288.
The case of
the Com-
missioners
of Sewers
for White-
chapel,
Raym. 186.
Vent. 66.
Mod. 44.
2 *Keb.* 635.
S. C.
Salk. 145.
pl. 6.
S. C. cited.

(a) That the commissioners of Cambridge Fens, by 15 Car. 2. c. 17., have an absolute jurisdiction, and are not to return their proceedings on a *certiorari*; but if they observe not the statute, their proceedings will be void, & *coram non iudice*, and the parties may examine the same by an action at law. Sid. 296.

Sid. 78.
Lord Dunbar's case.

If it be found before commissioners of sewers, that such a one ought to repair a bank, and he removes the proceedings into *B. R.*, the court will neither quash the inquisition, nor grant a new trial, unless he, who is found to be the person that ought to repair, will first repair the bank; after which, if it be otherwise found, they will order him to be reimbursed.

2 Hawk.
P. C. c. 27.
§ 34.
Salk. 145.
pl. 6. [See
further for
the practice
of the court
with respect
to the filing
of the orders,
Anon. 2
Barnardist.
151. Rex
v. Cann,

There is a rule in the court of King's Bench, that no order of commissioners of sewers ought to be filed without notice given to the parties concerned; also it is every day's practice of that court, before it will suffer the return of a *certiorari* for the removal of the orders of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supersede the *certiorari*, and grant a *procedendo*, as shall appear to be most reasonable for the trial of such issues, and to give (b) costs against the prosecutor of the *certiorari*, if it appears to have been groundless.

2 Str. 1263. A *certiorari* to bring up an order for the removal of their clerk; is of common right, and not discretionary, 1 Str. 609. Fortesc. 374. 8 Mod. 331.] (b) 2 Keb. 500.

2 Str. 1127.
[Q. Whether
an acre-
tax be a
right assess-
ment?

An order of sewers was made for levying 9d. per acre on 1312 acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commission, which was confirmed by the court of King's Bench.

whether the right way be not to assess the particular lands according to the danger they lie in. Commissioners of Sewers v. Newburgh, 3 Keb. 827. Bow v. Smith, 9 Mod. 94.]

2 Str. 1127. [A rate may be made to re-imburse charges.]

Court of Pipowders.

(c) Incident
to every
market as
well as fair.
4 Inst. 272.
Keilw. 99.

THIS court is incident to every fair and (c) market, and is called *curia pedis pulverisati* (d); because for contracts or injuries done concerning the fair or market, justice shall be done as speedily as the dust can fall from the foot (e).

Brownl. 175. Bulst. 55. Cro. Eliz. 773. — That there may be a court of pipowders by custom without fair or market, and a market without an owner. 4 Inst. 272. (d) Mirror, cap. 1. § 3. Bract, lib. 3. fol. 334. 4 Inst. 272. [(e) A more ingenious and satisfactory etymology is given by a learned

learned modern writer, who derives it from *ped poldreux*, a pedlar, in old French, and therefore signifying the court of such petty chapmen as resort to fairs or markets. Barrington's Observat. on the Stat. 337.]

It is a court of record, of which the steward is judge, there being no suitors.

Its jurisdiction consists herein, that the (a) contract or (b) cause of action be in the same time of the same fair or market, and not before, or in former; it must be for some matter concerning the same fair or market, done, complained of, heard and determined the (c) same day within the precinct of the same fair or market.

things arising within the fair. Roll. Abr. 545. Moor 830. Cro. Jac. 313. 2 Bulst. 21. (b) If one slanders another who trades in the market, in any thing which concerns his trade, as by disparaging his goods, which he exposes to sale there, an action lies; *secus*, if the words do not concern any thing touching the market. 10 Co. 73. Hall and Jones adjudged. Cro. Eliz. 773. Moor 623. S. C. adjudged. 4 Inst. 272. Roll. Abr. 544. S. C. cited. (c) The proceedings being *de hora in horam*. 2 Inst. 272. — This court continues during the time of the fair, and no longer. 2 Bulst. 23. — It may be adjourned from market to market. Keilw. 99. — The continuance may be entered by an *idem dies*, &c. Moor 459.

By the 17 E. 4. cap. 2., reciting, that divers persons coming to fairs be grievously vexed and troubled in the court of pipowders, by feigned actions, and also by actions of debt, trespasses, feats and contracts made and committed out of the time of the said fair, or the jurisdiction of the same, contrary to equity and good conscience, &c., it is enacted, "That no minister of any such court of pipowders shall hold any plea (d) without (e) oath made by the plaintiff or his attorney, that the contract or other feats contained in the declaration, was made within the fair, and within the time of the fair, and within the jurisdiction and bounds of the said fair."

4 Inst. 272. (e) Yet this concludes not the defendant, but notwithstanding he may plead to the jurisdiction of the court. 4 Inst. 272. 2 Bulst. 22.

[From this court a writ of error lies, in the nature of an appeal, to the courts at *Westminster*, which are now bound by the statute of 19 Geo. 3. c. 70., to issue writs of execution in aid of its process after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction.]

4 Inst. 272.
6 Co. 12.
2 Bulst. 23.
4 Inst. 272.
(a) Cannot hold plea of obligations, for this court is ordained for
(b) If one
(c) If one
(d) Though such oath ought to be made if the defendant will insist upon it, yet it shall not be made part of the record.
(e) To the jurisdiction.

Howell v. Johns, Cro. El. 773.

Of the Courts in London.

THERE are several courts within the city of *London*, which exercise a jurisdiction according to their own stated rules and forms, but yet are subject to the controul and correction of the king's courts at *Westminster*, whenever they exceed their jurisdiction; the chief of these are,

1. The Court of Hustings.

4 Inst. 247. This is the (a) highest and most ancient court of record within the city of *London*, and is always held at *Guildhall*, before the lord mayor and sheriffs of *London* for the time being; but when any matter is to be argued and determined in this court, the recorder sits as judge with the lord mayor and sheriffs, and gives rules and judgments therein.

House, thing, that is, the house of causes or things. 4 Inst. 247. [So, Sir H. Spelman in his Glossary *voc.* Hustings.]—But by Ferteſc. pref. to Monarchy 59. it is a pure *Saxon* word, signifying any council or court in general, and therefore applied to the supreme court of the city of *London*. The *Saxon* word, according to Junius, is borrowed from the *Islandick*.

4 Inst. 247. This court hath jurisdiction of (b) all pleas real, personal and mixt; and for this purpose it is distinguished into two courts, as the judges sit one week on real actions, and the other on those which are personal or mixt.

(b) In this court deeds may be enrolled, recoveries may be passed, wills may be proved, and replevins, writs of error, writs of right patent, writs of waste, writs of partition, and writs of dower, may be determined for any matters within the city of *London* and the liberties thereof. Lex Lond. 105. But note, That all real actions are now grown out of use.

4 Inst. 247. Judgment of outlawry in the hustings is not given by the mayor, who is coroner, or his deputy, but by the recorder, by the custom of the city.

Lex Lond. 15. In this court, the lord mayor for the ensuing year, the sheriffs, chamberlain, and bridge-masters, are chosen.

18 E. 3. 14. Roll. Abr. 745. S. C. Upon a judgment given in this court of hustings, a writ of error lies at St. *Martin's* (c) before certain justices.

Lev. 309. 2 Sand 252. S. P. And upon a judgment of the said justices a writ of error lies in parliament. 2 Leon. 107. (c) For their commission, &c., *vide* Reg. 150. F. N. B. 23.

2. The Sheriffs Courts.

4 Inst. 243. There are two sheriffs of *London* and *Middlesex*, each of whom keeps a court of record for all personal actions within the city of *London*; these courts are kept at *Guildhall*, and in each court a steward is the judge; they have belonging to these courts two prisons, called *counters*, the one in *Wood-street*, the other in the *Poultry*.

(d) But for this *vide* Lex Lond. 241. The (d) process in these courts is by summons, arrest, (e) foreign attachment, &c.

&c. (e) *Vide* for this title *Customs of London*.

4 Inst. 247, 248. From these courts a cause may be removed by *habeas corpus* to *Westminster-hall*; but if an erroneous judgment be given, the cause may be removed by writ of error to the *Hustings*, before the lord mayor and sheriffs.

Skin. 105. If a plaint be levied in a counter in *London*, and a *habeas corpus* brought, it is returned by that sheriff in whose counter the party is in custody, and he only is to answer if he escapes.

3. The Court of Equity before the Lord Mayor, commonly called the Court of Conscience.

The jurisdiction of this court arises from (a) a custom in *London*, viz. that if a plaint of debt is entered in the sheriff's court, upon suggestion of the defendant, the lord mayor may send for the parties, and for the record, and examine the parties upon their plea; and if he finds that the plaintiff is satisfied, he may award that the plaintiff shall be barred, but he cannot examine after judgment.

4 Inst. 248.
(a) That this is a reasonable custom, altho' it hath been of late abused.
Skins. 67.
pl. 13.
Hil. 26, 27
Car. 2. in
B. R. Buxton v. Singleton,
3 Keb. 432.
S. C.

Judgment was given in an action in the sheriff's court in *London*, and after it was removed to the mayor's court by *levata querela*, within which court there are four attornies, who, by an exclusive custom, are the only attornies of the court; one of them was assigned to the plaintiff by the recorder, who refused to act, as did all the others, because the then lord mayor was concerned in interest. On complaint to *B. R.* it was held, that no person could withdraw himself from the jurisdiction of the King's Bench, which had a power of obliging all officers to do their duty; that the denying justice in such a manner was of dangerous consequence, and might be punished by information, &c.; that in the case of the abbot of *Crowland*, 20 E. 4. the liberties were seized, because he had not officers; and that the attorney's refusal in this case was sufficient to forejudge him.

There is also the court of requests, which is called the court of conscience, and is held before certain commissioners at *Guildhall*, and was (b) established for recovering debts under forty shillings. Lex Lond. 229.
(b) First began by an act of council, 9 H. 8. but has since been confirmed by act of parliament, 3 Jac. 1. c. 15. which *vide*, act 14 Geo. 2. c. 10.

This court cannot grant prohibitions to stay proceedings in the courts at *Westminster*; and therefore where *J. S.* brought debt upon an obligation of 10*l.* for payment of 5*l.* in *B. R.*, against a freeman of *London*, who cited the plaintiff in the court of conscience, surmising that less than 40*s.* was due; the plaintiff appeared there, and shewed the obligation; notwithstanding which, the commissioners there, upon the allegation of the defendant, that less than 40*s.* was due, ordered the plaintiff to accept it, and to stay proceedings in *B. R.*, which he refusing, the commissioners ordered the registrar to keep the obligation, so that the plaintiff could not proceed in *B. R.*; whereupon the court granted an attachment against the commissioners and registrar.

3 Keb: 533.

Curtesy of England.

Dr. & Stud.
lib. 1. c. 7.
Co. Lit.
30. a.
Cowel, tit.
Curtesy; it
began in
England and
Ireland in
the time of

TENANT by the curtesy is he, who after his wife's death (having had issue by her inheritable) is introduced into her inheritance, and has an estate for life therein; and he is so called from the favour or curtesy of that law which made this provision for him, to which he had no natural right, nor to which any other nations, (a) except those of *Great Britain* and *Ireland*, admitted him.

H. 1. Seld. Jan. 65. and in Scotland in the time of Malcom. Macan. 56. Both by a positive institution. [(a) This is a mistake; it was known in other countries, though not under this name. By the rescript of Conitantine it is established, *ut hæreditatis maternæ pater usum fructum, filii proprietatem haberent*. Crag. j. f. dieg. 22. § 40 Cod. l. 6. de. 1. And the laws of the Almain define the estate almost in the very terms used by the laws of England. Lindenbrog, L. Aleman. 1. 92. We find it in the feudal system, not indeed as a necessary consequence of the feudal tenure in its original purity, but arising from the express terms of the investiture. The language of the feudal law is *maritus uxori non succedit in feudum, nisi sit specialitèr investitus*. Wright's Ten. 193. n. c. — Sir W. Blackstone inclines to think, that tenancy by the curtesy of England was so called, as signifying an attendance upon the lord's court or curtil, (that is, being his vassal or tenant,) not as denoting any peculiar favour belonging to this island. 3 Comm. 126. The contrary, however, is maintained by one of his successors in the Vinerian chair. 2 Wooddef. 18.]

Rot. Claus.
11 H. 3.
Wright's
Ten. 193.
n. 9.
Hale's Hist.
C. L. 180.

[The words of this law, as they are found in a writ of 11 H. 3. ordaining the reception of it in *Ireland*, are, *Si aliquis desponsaverit aliquam mulierem, sive viduam, sive aliam, hæreditatem habentem, et ipse postmodum ex eâ prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, si super vixerit ipsam uxorem suam, habebit totâ vitâ suâ custodiam hæreditatis uxoris suæ licet ea fortè habuerit hæredem de primo viro qui fuerit plenæ ætatis.*]

- (A) What Persons may be Tenants by the Curtesy; what not.
- (B) Of what Sort of Inheritances this Estate is allowable; of what not.
- (C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy: And herein,

1. The descendable Quality of such Estate.
2. The Seisin of the Wife thereof.
3. When this Estate and Seisin is to begin, and how long it must continue.

(D) Of

(D) Of the Husband's Title being initiate by having of Issue, and to what Purposes : And herein,

1. What Sort of Issue this must be.
2. When it must be born.
3. What it must do to entitle the Husband to be Tenant by the Curtesy.

(E) The Nature and Quality of such Tenancy by Curtesy :

1. With respect to the Estate itself.
2. With respect to the Privy between him and the Heir.

(F) By what Means this Title may be prevented and destroyed.

(A) What Persons may be Tenants by the Curtesy; what not.

1. **T**HE words of this law are general, and seem to extend to all sorts of persons without distinction; therefore (a) idiots and lunaticks, and (b) villains, may be tenants by the curtesy. [(a) But the marriage of persons in this unhappy state is merely void, by reason of their incapacity to contract, and one of the circumstances necessary to the completion of their title to the estate is therefore wanted.] (b) The lord, if he will, may enter and hold those lands against the villain and his issue for ever. Co. Lit. 118. 123. a.

2. Persons convicted only of (c) felony or treason, persons (d) outlawed in any civil action, may be tenants by the curtesy. (c) For they forfeit only their goods and chattels absolutely, for of their lands the king gains but a perannuity of the profits. 5 Co. 110. Co. Lit. 92. b. 391. a. Stanf. 192. (d) Bro. tit. Outlawry 26. 36. 55. Co. Lit. 128. For such process of outlawry might be easily superseded, and thereby the king's perannuity of the profits discharged.

3. But persons attainted of (e) felony or treason shall not be tenants by the curtesy; for they being thereby *extra legem positi*, and their persons forfeited to the king, they are thenceforth become incapable of our laws in general, and, by consequence, of this in particular, which intended to give the inheritance only to those who were capable of holding it *tota vita sua*: also, persons attainted in (f) a *præmunire* are excluded the benefit of this law, and also (g) *aliens*, be they friends or enemies; and in these cases their title shall never arise, even for the benefit of the king, but the wife's estate shall be discharged of it for ever. (e) Bro. tit. Curtesy, 15. Staundf. 196. Godb. 323. (f) Co. Lit. 391. a. 3 Inst. 43. (g) But if the alien be made denizen, or the person attainted pardoned, and have issue after, they may be tenants by the curtesy, in respect to that issue had after, but not in respect of any issue had before. 7 Co. 29.—Popish recusants were disabled from being tenants by the curtesy, 3 Jac. 1. c. 5. § 13.

done, and have issue after, they may be tenants by the curtesy, in respect to that issue had after, but not in respect of any issue had before. 7 Co. 29.—Popish recusants were disabled from being tenants by the curtesy, 3 Jac. 1. c. 5. § 13.

(B) Of what Sort of Inheritance this Estate is allowable; of what not.

Dr. & Stud.
203. Perk.
457. 463.
Dyer, 9.
pl. 25.
Co. 1. 123.
4 Inst. 87.
[(a) But
curtesy of
trusts is now
allowed in
equity, tho'
dower is
refused.
Otway v.
Hudfor,
2 Vern. 583.
Williams v.
Wray, id.
681. Chap-
lin v. Chap-
lin, 3 P.
Wms. 229.
And there-
fore of mo-
ney to be
invested in
land. Sweet-
apple v.
Birden, 2 Vern. 536. Cunningham v. Moody, 1 Vez. 174.]

1. OF a use at common law, or what is now called a trust, it is expressly resolved, that a man shall not be tenant by the curtesy; (a) and *Doct̃or and Student* assigns this as one reason, why so much land was put in use to prevent this title; and the 27 H. 8. cap. 10., in the preamble recites this as one of the mischiefs that statute intended to remedy; the reason seems, that of a use there was neither tenure nor wardship, nor any escheat nor benefit to the lord, and therefore not within the reason of this law; besides that the feoffees were tenants to the lord, and the land in their hands the proper subject of such titles, and therefore could not be double out of the same lands. Another reason may be, that the use consisting merely in privy between the feoffor and feoffees, and being in the nature of a thing in action, for which no remedy lay but by *subpœna* in Chancery, and therefore none could have any remedy for it but those who were parties or privies to the feoffment, or within the words or plain meaning thereof, and, consequently, the husband could not be tenant by the curtesy, nor his wife be endowed thereof, they being strangers and collaterals to the feoffment; and the denying them the rents and profits, could be no breach of trust in the feoffees, they not being originally trusted for any such purpose, nor compellable to account to them,

4 Co. 22.
Hob. 216.
Cro. Eliz.
361.

2. A man shall not be tenant by the curtesy of a copyhold unless there be a special custom to warrant it, for the freehold and inheritance being in the lord, and the copyhold being only a customary right of taking the profits time out of mind at the will of the lord, this custom, like all others, must be a law to itself, and all estates derived thereout are so far good as they are warranted by that law, and no farther; if, therefore, there be no custom for a man to be tenant by the curtesy, of his wife's estate, there is no law by which he can claim it; and if there be no law, he can have no more right than to another man's property; and this statute cannot operate upon copyhold, since this statute, like other statutes, was made within time of memory, and so falls short of any share in the original constitution, or governing of copyholds; and for this reason, where such custom of holding by the curtesy has prevailed, it has yet been taken literally strict, and not to be extended in the least beyond those bounds the custom has allowed of.

3. As where *J. S.* set forth, that within such a manor there was a custom, that if one took to wife any customary tenant of the said manor in fee, and had issue by her, if he outlived such wife he should be tenant by the curtesy; and the case was, that *J. S.* married a woman, who at the time of the marriage had not any copyhold, but afterwards, during the coverture, a copyhold descended to her; it was adjudged, that he should not be tenant by the

the curtesy by this custom, for that his wife was not a customary tenant at the time of the marriage, which by the strict and literal meaning of the custom she ought to be. 2 Leon. 109.
208. S. C.
cited.

4. Of an annuity to a woman and her heirs, after a writ of annuity brought, a man shall not be tenant by the curtesy any more than a woman shall be endowed thereof, for thereby it becomes a personal inheritance. Co. Lit.
144. b.
Poph. 87.
Moor, 83.

5. A man may be tenant by the curtesy of lands held in *antient demesne*, and a woman may claim dower of such lands: also, of lands in *Borough-english*. Alden's case.
5 Co. 105.
Cro. Eliz.
826. [S. C.
the reports.]

2 And. 178. S. C.; but this point does not appear in any of

6. Of lands in *gavelkind*, (a) a man may be tenant by the curtesy without having issue by his wife, by the custom; and herewith our statute has nothing to do, since custom, a law of much longer standing, had already provided for him, and prescribed the terms of his enjoying of it. Co. Lit.
30. a.
Dav. 50.
L.P.R. 627.
[(a) But of
such lands
of the wife

the tenancy by curtesy extends only to a moiety, and it ceaseth if the husband marries again. This at least is the custom of gavelkind in Kent. Rotins. Gav. b. 2. c. 1.]

7. There are some kinds of inheritances whereof a man may be tenant by the curtesy; though a woman, in such case, shall not be endowed; as if lands holden of the king by knight's service descend to a woman, and after office found she intrudes and taketh husband, and hath issue, in this case the husband shall be tenant by the curtesy; yet if the heir male, after office found in the like case, intrudeth, and taketh a wife, she shall not be endowed, by the express provision of *Prærogat. regis, cap. 13*. But this statute doth not alter or abridge the statute that gives a man a title by the curtesy. Prærog. Re-
gis, c. 13.
4 Co. 55.

8. So, if a man marry the niece of the king, by his license, (which amounts to an enfranchisement, at least during the coverture,) and after lands descend to the wife, and the husband hath issue by her, and then she dies, the husband shall be tenant by the curtesy: but if a woman marry the villain of the king, by his license, she shall not be endowed; for notwithstanding the license, he still remained a villain to the king, who may enter at his pleasure, and defeat the wife's title of dower by his own title paramount. Co. Lit.
30. b.

9. A man shall be tenant by curtesy, of a castle, of a (b) house that is *caput baroniæ*, or *comitatûs*, because able to defend the realm, and of a common without number; but of these a woman shall not be endowed. Co. Lit.
30. b.
(b) But for
this vide
head Dower,

and that by a late resolution, a woman shall be endowed of such a house.

10. Of offices of profit a husband shall be tenant by the curtesy. Plew. 379.
My Lord

Coke cites some ancient records, wherein tenancy by the curtesy was allowed of dignities and offices of honour, as to carry a sword before the king at his coronation, to be his carver upon that day; and to the Earl of Salisbury by the curtesy; but these being offices, as appears, annexed to particular dignities, or being dignities themselves, and capable of being entailed, may without any inconvenience be allowed the privilege of this law. Co. Lit. 29. But see note (1.) in the 13th edit.

Roberts v.
Dixwell,
1 Atk. 607.

[11. Where a testator directed his trustees to convey a fourth part of his freehold lands to the use of his daughter for her natural life, so as she alone should take the rents, her husband not to intermeddle therewith; and after the performance of several other trusts, in trust for the heirs of the body of the daughter; Lord *Hardwicke* held, that in this case the trust was merely executory, that the wife took an estate for life only, and therefore the husband was not entitled to be tenant by the curtesy.]

(C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy.

Lit. § 35.
Dyer, 148.
6 Co. 41.
8 Co. 36.
Co. Lit. 227.
8 Co. 34.
Leon. 167.
Pain's case.
Co. Lit.
30. a.
[(a) But
the wife
must be sole
tenant both
of the free-
hold and the
inheritance.

1. *LITTLETON* acquaints us, that it must be an estate either in fee-simple or fee-tail general, or where the wife has it as heir of the special tail (a); and my Lord *Coke* says, for the husband to be tenant by the curtesy is one of the incidents to an estate-tail, which to restrain by condition, were repugnant, &c.; and therefore if a woman, tenant in tail general, marries and hath issue, which issue dieth, and then the wife dies, so that the estate is thereby determined, yet the husband shall be tenant by the curtesy; the same law if the limitation had been to the woman and the heirs of her body, upon condition, that if she die without issue then to remain to another; for this is not a condition but a limitation, and no more than what the law saith.

Co. Lit. 183. a.]

Co. Lit. 30.
a. note (2),
13th edit.
[As the sta-
tute *de donis*
does not
extend to
husbands
claiming
curtesy, or
wives claim-
ing dower,
it is for this
reason, prob-
ably, that a

2. So, if one, seised of a rent in fee, makes a gift in tail general, or if a rent *de novo* be granted in tail general to a woman, who marries and hath issue, the issue dieth, and then the wife dieth without other issue, yet the husband shall be tenant by the curtesy, of the rent, though the estate-tail therein be determined and spent; for this being an incident to such an estate at the time of its creation, whenever the husband has issue, his title is initiate, and shall not be lost after by failure of issue, which, being the act of God, ought not to turn to his prejudice; and this is within the words of our law *hereditatem habentem*, without fixing its continuance.

husband may have curtesy, and a wife dower of a rent reserved upon a gift in tail. For though as between the donor and his heirs, and the donee and his heirs, the rent is incident to the reversion in consequence of the statute *de donis*, yet, as against a husband claiming curtesy, or a wife claiming dower, the donor must, to warrant the positions of Lord *Coke*, have a rent in gross, that is distinct from any estate, as he had before the statute *de donis*. *Preston on Estates*, c. 6. note.]

[So, of estates determining by a *springing* or *shifting use*, the husband, by the latter opinion, shall have his curtesy, notwithstanding the determination of the estate of his wife. And of this opinion was *Anderfon*. If a feoffment, said he, be made to the use of *J. S.* and his heirs, until *J. D.* hath done such a thing, and then unto the use of *J. D.* and his heirs, the thing is done, and *J. S.* dieth, his wife shall be endowed. In this case the estate of *J. S.* was a determinable fee in point of quality, but it is not on that account that

1 Leon. ubi
supra.
Preston on
Estates, ubi
supra.

that the wife was entitled to dower, but because the estate of *J. D.* took effect by *springing* or *shifting use*. And this opinion of *Anderſon* has been followed by a decision to the same effect in the case of an executory devise. Thus *Joseph Sutton* devised his estate to trustees, upon trust to pay the rents and profits for the maintenance and education of *Mary Barrs*, till she arrived at twenty-one or was married; and from and after the said *Mary Barrs* should have attained her age of twenty-one years, or should be married, he gave and devised all the said land and premises to the said *Mary Barrs*, her heirs and assigns for ever. But in case the said *Mary Barrs* should happen to die before she arrived at the age of twenty-one years, and without having issue of her body lawfully begotten, then, from and after the decease of the said *Mary Barrs*, without issue as aforesaid, he gave and devised all his said estates unto his grandson *Walter* for life, with several remainders over. *Mary Barrs* married *Solomon Hansford*, and had issue a son, who died in her life; and afterwards *Mary Barrs* died under twenty-one. In this case, the court of King's Bench were unanimously of opinion, that on the decease of *Mary Barrs*, her husband became entitled to be tenant by the curtesy for his life, and that, subject thereto, the devisees over became entitled by way of executory devise.]

Buckworth v. Thirkell,
Tr. 25 G. 3.
Co. Lit. 241.
a. note 4.
13th edit.
1 Collect.
Jurid. 332.

But to understand the nature of the wife's estate, we must consider farther,

1. The Descendible Quality of such Estate.

1. The rule herein to be observed is, that the issue of such husband may by possibility inherit.

This rule seems to have been

formed after the statute *de donis*, and by virtue thereof; for our statute requires no such property in the inheritance, neither did the common law; but for this *vide* 2 Inst. 336. 8 Co. 35, 36. Co. Lit. 29 b. Perk. 465.

2. Therefore if lands are given to a woman and the heirs male of her body, and she has issue a daughter, and dies, the husband shall not be tenant by the curtesy; the same law if it hath been given to her and the heirs female of her body, and she had issue a son.

8 Co. 35.
Co. Lit.
29. b.

3. But if a woman seized in fee marries, and hath issue, and then the husband dies, and she takes another husband, and hath issue by him and dies; though the first issue be living, yet the second husband shall have it by the curtesy, because his issue, by possibility may inherit; as if the first issue die without issue, whereby it comes to the uncle, &c.

Bro. tit. 1.
Curtesy, 8.
Perk. 466.
8 Co. 34.
Lit. § 52.

[It is essential to this estate, that the issue should take as heir to the wife; that they should take by descent; for if they take by virtue of a remainder over, their birth will not entitle the husband.]

8 Co. 34.
Summers v. Partridge,
2 Atk. 47.

2. The Seisin of the Wife thereof.

1. That the wife must be *seised* of the estate, is required by the very words of the law, which says, *aliquam hereditatem habentem*, so that there must be a possession of such inheritance by the very words

Dr. & Stud.
lib. 2. c. 15.
Perk. 464.
Co. Lit. 29.
words 1. 90.

8 Co. 34. 36.
F. N. B.
143.
Keilw. 2. a.
Bro. tit.
Curtesy, 7.
* Perk. 470.
[(a) But
entry is not
always ne-
cessary to
give seisin
in fact; for
if the land
be in lease
for years,
curtesy may
be without
entry, or
even receipt
of rent, the
possession of
the lease for
years being
deemed the

words of the law; and therefore if a man die seised of lands in fee-simple or fee-tail general, and those lands descend to his daughter, and she marry, and have issue and die, before any entry made by her and her husband, or any other for them, the husband shall not be tenant by the curtesy; but here we must understand seisin in a two-fold sense, viz. seisin in fact and seisin in law; and where a seisin in fact may be had, as in the above case, there, a seisin in law will not do; nay, though the husband doth all he can to get possession in his wife's life-time, and as soon as he heareth of her father's death, goeth towards the land to take possession, and before he can come there the wife dies, yet he shall not be tenant by the curtesy, and therefore one * book says, he should have spoken to some neighbour, being near the lands, to have entered for his wife, as in her right, immediately after the father's death; and the reason of this is from the words of the law, which require that the wife should have actual possession of the inheritance; and of things lying in livery the wife hath not actual possession till the entry of the husband (a).

possession of the husband and wife. De Grey v. Richardson, 3 Atk. 469.]

Co. Lit. 29.
Perk. 468,
469.
7 Ed. 3. 66.
Keilw. 104.
Co. 97.
6 Co. 68.
F. N. B.
149. Bro.
tit. *Curtesy*,
5. 9.
2 Sid. 110.
[(b) But if
the advowson
be ap-
pendant to
a manor,
and the wife
die before
entry into the

2. But now of such inheritances, whereof there cannot possibly be a seisin in fact, a seisin in law is sufficient; and therefore if a man seised of an advowson (b), or rent in fee, hath issue a daughter, who is married and hath issue, and he dieth seised, and the wife dieth likewise before the rent becomes due, or the church becomes void, this seisin in law in the wife shall be sufficient to entitle her husband to be tenant by the curtesy, because, say the books, he could not possibly attain any other seisin, as indeed he could not, and then it would be unreasonable he should suffer for what no industry of his could prevent; but the true reason is, that the wife hath these inheritances which lie in grant, and not in livery, when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it.

entry into the manor, Lord Hale thought the husband would not be entitled to be tenant by the curtesy of the advowson. Hal. MSS. Hargr. notes on Co. Lit. 29. a.]

Calborne v.
Scarfe,
1 Atk. 603.
Vin. Abr.
Curtesy, E.
pl. 23. S. C.
more fully
reported.

[So, of lands mortgaged in fee by the wife previously to the marriage, the husband shall be entitled to be tenant by the curtesy. For his neglect in not paying off the mortgage, is not similar to the case of laches in a husband, viz. as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and an objection of this kind holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is attended with many delays.

Ewer v. At-
wike, 1 An-
derf. 192.
Moor, 272.
Hearle v.
Greenbank,
3 Atk. 695.
1 Vez. 298.

In copyholds where the custom allows of this estate, the entry of the husband in the right of his wife in her life-time, though she dies before admittance, will, it seems, be a sufficient seisin.

With respect to trusts or equitable estates, the wife must have such an interest that her husband may have a seisin or possession in nature of a seisin in her right. Therefore, where a father de-
vised

vifed eftates to trustees in truſt to apply the profits for the ſole and ſeparate uſe of his daughter (a feme covert) during her life, and not to be ſubject to the debts or control of her husband, with power to diſpoſe of them by will, notwithstanding the coverture; Lord *Hardwicke* held, that the husband had no ſeiſin either in law or in equity, and therefore was not entitled to be tenant by the curteſy: that the legal eſtate was in the trustees: that the father had made the daughter a *feme ſole*, giving her the profits for her life, but not ſubject to the control of her husband; the husband then had no ſeiſin in equity during the coverture: and further, the tenancy by curteſy in this caſe would be directly contrary to the intent of the teſtator.]

See Mr. Preſton's obſervations on this caſe in his chapter upon this title. Preſt. on Eſtates.

3. When the Eſtate and Seiſin is to begin, and how long it muſt continue.

1. The eſtate and ſeiſin of the wife ought to begin ſome time during the coverture; ſo the words of the law import, *ſi aliquis deſponſaverit aliquam hereditatem habentem*, &c., and therefore if a woman be diſſeiſed and marry and die, leaving iſſue before any re-entry made, the husband ſhall not be tenant by the curteſy; for here ſhe had no inheritance, but only a right to an inheritance, which is out of the words of this law; but if the husband or wife had entered during the coverture, there, after the wife's death, he ſhould have it by the curteſy, becauſe ſhe had *hereditatem* during the coverture.

Co. Lit. 29. a. 30. a. Perk. 458.

2. If a woman ſeignoreſs intermarry with the tenant, and have iſſue and die, the husband ſhall not be tenant by the curteſy of the ſeignory, becauſe by the intermarriage the ſeignory was in ſuſpence, and ſo ſhe could not be ſaid to have it, or if ſhe had, it is like the ſeiſin of an inſtant, whereof a woman ſhall not be endowed.

3 Leon. 347. Perk. 460. Co. Lit. 29. b.

3. A woman tenant in tail, *apres* poſſibility, &c. takes husband, and hath iſſue, and the fee-ſimple deſcends upon the wife, be it before or after marriage, the husband ſhall be tenant by the curteſy, becauſe by the deſcent of the fee the other eſtate was merged and gone, and ſhe became tenant in fee-ſimple executed.

Bro. tit. Curteſy, 4.

4. In treſpaſs, the defendant ſays, that one *A.* was ſeiſed of thoſe lands in her demefne as of fee, and that he took her to wife, and they had iſſue between them, and after *A.* died, and he held himſelf in as tenant by the curteſy, and (*inter alia*) it was moved, that he did not ſhew that after the marriage he was ſeiſed in his demefne as of fee in right of his wife; and though it was answered, that his ſhewing that *A.* was ſo ſeiſed, and that he took her to wife was ſufficient, ſince it could not be intended but that the defendant was ſeiſed in fee, as in right of his wife; yet, ſays the book, the defendant *videns opinionem curiæ* amended his plea according to the exception taken by the plaintiff.

Keilw. 2. which plainly ſhews, that ſeiſin, in the wife ſome time during the coverture, is eſſential to make the husband tenant by the curteſy.

5. If a woman ſeiſed in fee makes a leaſe for life, or endows her mother, and after has iſſue and dies, leaving the leſſee or mother, the husband ſhall not be tenant by the curteſy of the re- verſion.

But in the caſe of the leaſe, if a rent were reſerved to

her and her heirs, *Q.* if the husband ſhall not have the rent during its continuance, and after the death

of the lessee, the land itself, as tenant by the curtesy; and *vide* Perk. 467. Co. Lit. 29. a. Bro. tit. Curtesy, 10. Co. Lit. 15. a. 32. a. Keilw. 104. pl. 12.

Bro. tit.
Curtesy,
121.

6. In a *quare impedit* by the king against divers, the defendant makes title that the advowson descended to three coparceners, who made partition to present by turns, the eldest to have the first, the middle the second; and that he married the youngest, and had issue by her, and she died, and the church became void, and so it belonged to him to present, and doth not allege that ever his wife presented; yet he was allowed tenant by the curtesy by the seisin of the others; the reason of which case seems to be, that the advowson being in its nature entire and indivisible, and descending upon all the daughters as coheirs, though they agree to share the fruits of it in such proportions among themselves, yet the inheritance remains entire in them all, and they all have a seisin in law before presentment by either, which, according to the rules before laid down, is sufficient to entitle the husband to be tenant by the curtesy.

z Sid. 110.
117. De-
thick v.
Bradburn.
In this case
no judgment
is given,

but the opinion of Glyn, Ch. Just. was, that he should; for though this begins *in futuro*, yet it is grantable over presently, which proves it to be *in esse*, and then the may be well said *habere hæreditatem*, and the seisin is not material, especially in the case of a rent.

The time when this estate and seisin in the wife is to begin, whether before or after marriage, is not material; and therefore if a woman marries, and hath issue, which dies, and after lands descend to the wife, and the husband enters, and then the wife dies without other issue, yet the husband shall be tenant by the curtesy, for the time of the descent is not material, so it be during the coverture. The same law is, if lands had been conveyed to the wife *mutatis mutandis*.

Co. Lit. 40.
a. 351. a.
Bro. tit.
Curtesy, (3.)
But Q. If
in this case
after issue
had, the
feme had
been at-
tainted of
treason, if
the hus-
band's ini-
tiate title
shall prevail
against the king? Q. Also, in the case of the felony, if the husband may enter presently upon the attainder during the wife's life, who is thereby *civilitèr mortua*, as he might, if the wife had abjured the realm, which is one kind of attainder; for which *vide* Co. Lit. 133. And that the abjuration is an attainder, *vide* Co. Lit. 13. a. 390. b.

As to the continuance of this estate and seisin in the wife, in some cases it is necessary it should continue in her till issue had, and in some not; and in some cases continuance both before and after will not serve: for the first, if a woman seised in fee of lands hath issue, and after commits felony, and is attainted thereof, yet the husband shall be tenant by the curtesy, in respect of the issue had before, and which by possibility might have entered; *aliter*, if the wife had been attainted before issue: but in the other case, the husband's title, by the having of issue was so far initiate, that the lord might avow upon him for homage without the wife, and then her crimes after shall not defeat him of it; besides, this is within the letter of our law, &c.

In some cases it is not necessary that the seisin should continue till issue; and therefore if a man, seised of lands in fee in right of his wife, is disseised before issue, and afterwards he hath issue, and the wife die before any re-entry made, yet the husband may re-enter and hold the land as tenant by the curtesy, for the disseisin left a right in him to be tenant by the curtesy, if he had issue, as it did in the wife and her heirs to the inheritance.

So, in such case, if a recovery had been had against the baron and feme by erroneous process, or by false swearing, and after execution sued thereof they have issue, and the wife dieth, yet the husband shall have error or attain, and upon reversal shall enter and hold as tenant by the curtesy, for being party to the record he may well have these writs, and when the recovery is reversed, it is so *ab initio* as to him.

In some cases continuance of seisin before and after issue will not do, therefore, if a woman makes a gift in tail, reserving rent in fee, and marries and hath issue, and then the donee dies without issue, and then the wife dies, the husband shall not be tenant by the curtesy of the rent, for that is determined and gone, but he shall have the land.

If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot, by office, the land shall be seised for the king; for when the title of the king and a common person begin at one instant, the title of the king shall be preferred; a *fortiori*, in this case, if the woman had lands before issue, and after issue had been found an idiot.

no longer than during the idiot's life.

If a daughter inheritrix marries and hath issue, and after a son is born, who enters upon the husband and wife, and then the wife dies, the husband's title is defeated; but if after the son had died without issue, and the husband had re-entered, it seems he should be tenant by the curtesy, whether he had issue by his wife after or not, and though such first issue was dead before his re-entry: so, if the daughter in such case after issue had endowed her mother, and after the mother dieth, and the husband re-enters, and his wife dieth without other issue, yet it seems reasonable the husband should have it by the curtesy: otherwise, in these cases, if the son or the mother had not died till after the death of the wife, for their title in both cases was paramount the wife's, and disaffirms her title *ab initio* from the death of the father; but when the son or the mother dies, living the wife, then the estate comes to her again, and whether it come before or after issue, so there be an entry made, is not material, as before appears.

If a woman tenant in tail generally makes a feoffment in fee, and takes back an estate in fee, and marries, and hath issue and dies, yet the issue may recover in a *formedon* against his father and then he shall not be tenant by the curtesy; for the estate-tail he cannot have, that being discontinued during the whole coverture; the fee he cannot have, that being defeated and gone, and the issue restored to his right *per formam doni*; and as the estate of the

wife, during the coverture, was tortious, so must the husband's be too after her death, and liable to be defeated by the issue.

(D) Of the Husband's Title being initiate by the having of Issue, and to what Purposes: And herein,

1. What Sort of Issue this must be.
2. When it must be born.
3. What it must do to entitle the Husband to be Tenant by the Curtesy.

8 Co. 35.
Pain's case,
Co. Lit. 29
b. S. P.

AS to the first, if a woman be delivered of a monster, which hath not the shape of mankind, this is no issue in law; but however deformed it may be, or if it be born deaf and dumb, or an idiot, yet this is such issue as will entitle the husband to be tenant by the curtesy.

2 Co. 35.
Co. Lit.
29. b.

2dly, It must be born during the life of the wife; therefore if the wife die in child-bed, and the issue is ript out of her womb, the husband shall not be tenant by the curtesy, because he hath no issue during the marriage, and therefore he cannot be said *ex ea prolem habere*, and in pleading he must allege that he had issue during the marriage.

2 Co. 34.
Co. Lit.
29. b.
Dyer, 25.
pl. 159.
Bendl. 21.
Perk. 471.
Kerw. 2. a.
But in Scotland they require that the child should cry.

3dly, The statute says, *cujus clamor auditus fuerit*; but this is put but for an instance; for if it be born alive, though dumb, and could not cry, it is within the meaning of this statute; and there are other signs of life besides crying, as motion, &c., but some books seem to incline, that it ought to be baptized, and if it be not, through the husband's neglect, he shall not be tenant by the curtesy; but the statute requires no such thing, and therefore it seems no essential part of his title.

Co. Lit. 30.
a. 67. a.
2 Inst. 145.

As to what purposes this title is initiate in the husband by the having of issue, it appears before, that after issue had he shall do homage alone, and receive homage alone during the life of his wife, and avowry shall be made only upon him; for the statute says *si ex ea prolem habuerit, &c. habebit tota vita sua custodiam hereditatis*; but homage done by the husband before issue shall not bind the wife.

17 Ed. 3. 51.
Co. Lit. 30.
a. 183. a.
accord.
2 Roll.
Abr. 90.
Co. Lit. 183.
a. cont.

Therefore if an estate be made to two women, and the heirs of their two bodies, and one of them marry, and have issue and die, the husband shall be tenant by the curtesy of her moiety; for this statute severs the jointure between them by giving the husband the custody of it in the life of the wife; but if such limitation had been to two men in this manner, their wives should not be endowed, for the jointenancy takes place of the dower.

Co. Lit. 30.
a. 326. a.
Dow. 363.
pl. 26.

If the husband, after issue, makes a feoffment in fee, and the wife dies, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not, during his life, avoid it by *sur cui*

cui in vita, for it could not be a forfeiture, because the estate of tenant by the curtesy was but initiate, and not consummate; and now since 32 H. 8. cap. 28. the issue shall not enter in such case till after the husband's death, which shews, that in this feoffment his interest and title to be tenant by the curtesy is involved, and passes by it to the feoffee, though not to such purpose to make him tenant by the curtesy, which none but the husband himself can be; for the same reason, it seems, that after issue he may lease the lands for his own (a) life.

ther may be asked, viz. who is to avoid the lease, if the tenant chooses to hold the land?]

8 Co. 72.
(a) But if such feoffment or lease before issue shall be made good for his life by issue had after.—
[In answer to this question, another]

Baron and feme have issue, and after join in suffering a recovery, the feme was within age and appeared by attorney, yet after her death it seems the heir could not assign this for error till after the husband's death.

Hob. 324.
Darcy v. Lee.

(E) The Nature and Quality of such Tenancy by Curtesy.

1. With respect to the Estate itself.
2. With respect to the Privy between him and the Heir.

AS to the first, this estate, in several respects, is looked upon as a continuance of the estate of the wife, and therefore if three coparceners are of an advowson, and they agree to present by turns, the eldest first, and so on, and the eldest die, her husband, tenant by the curtesy, shall present as she should have done; and so of any of the other sisters.

3 Co. 22.
Co. Lit. 166.
b. 186. a.
2 Inst. 365.
Cro. Eliz.
19. F. N. B.
34. Bro. tit.
Curtsy, (2.)
Co. Lit. 174.
b. 175. a.
Keilw. 118.

So, a writ *de partitione faciendâ* lies against tenant by the curtesy, because he is in continuance of the estate of coparcenary, though not being a coparcener in fact he cannot have such writ.

If baron seised of an advowson in right of his wife presents, and after hath issue, and the wife dies, and then the church becomes void, the husband shall not have assize *de darrein presentment*, because he is in of another estate than that upon which he presented before; for before he had no estate but in right of his wife, and now he is seised for his own life, as tenant by the curtesy.

after issue, he should have had this writ.

2 Roll.
Abr. 38.
Keilw. 118.
2. But it seems clear, if the first presentment had been

The wife's heir shall not be in ward during the life of tenant by the curtesy, because by his continuance of his wife's estate, the descent to the heir is interrupted.

F. N. B.
143.

If a woman, tenant in tail, acknowledge a statute and marry, and have issue and die, the land may be extended in the hands of her husband, tenant by the curtesy.

Dyer, 51.
in margine.

So, the entry of the disseisee is congeable of the tenant by curtesy, but not on the heir after his death.

9 H. 7. 24.

If tenant by the curtesy alien in fee, in tail, or for life of the lessee, he in the reversion shall have a writ of entry *in casu consimili* presently, by the statute of *Westm. 2. cap. 24.*

2 Inst. 309.

Hob. 21.
2 Jones, S.
Roll. Abr.
167.

If tenant by curtesy grant his estate with warranty, and come in as vouchee, he shall have aid of him in the reversion for the weakness of his estate; so, if he himself be empleaded.

3 Co. 22.
9 Co. 142.
11 Co. 83.
4 Co. 62.
Co. Lit. 54.
2 Inst. 301.
F.N.B. 56.
Cro. Car.
430.
Dr. & Stud.
lib. 2. c. 1.

As to the privity between him and the heir, this is so inseparable, that at common law, although both had, as it were by consent, granted away their estates, yet no action of waste lay against any other than the tenant by the curtesy, nor against him by any other than the heir at law; but now by the statute of *Gloucester, cap. 5.* remedy is provided for the grantee of the reversion against tenant by the curtesy, so long as he continues his estate, or against his assignee, if he assign it over; but still so long as the heir keeps the reversion, tenant by the curtesy is liable to his action of waste notwithstanding any assignment, that statute having provided no remedy for this case; and the same law of tenant in dower.

(F) By what Means this Title may be prevented and destroyed.

Bro. tit.
Curtesy, (6.)
Co. 111.
Hob. 338.
Moor, 31,
32. But
Q. as to the
first case,
because the
feoffment
being before

IF the husband before issue make a feoffment in fee, and retake an estate to him and his wife, by which the wife is remitted, and after he have issue, and the wife die, yet he shall not be tenant by the curtesy, for the law gives him *custodiam hereditatis*; and if he part with it in fee, so that it is once out of him, there is no law that gives it to him again, since he hath extinguished it by his unjust alienation; *a fortiori*, if after issue he hath made this feoffment.

issue, the husband hath not title either initiate or consummate, but his title began wholly afterwards by the having of issue, and then the wife was in actual seisin by the remitter.

Co. Lit.
30. b.

So, if after issue he make a feoffment in fee upon condition, and re-enter for the condition broken, and then the wife die, yet he shall not be tenant by the curtesy, for that title was inclusively past and given away by the livery, and the condition was not annexed to his title but to the feoffment; and yet if such feoffment were before issue, one (a) book makes a *q.* of it; but it seems clear in this case he shall not, because, upon his re-entry for the condition broken, he is not in of an estate in right of his wife, but of the tortious estate gained upon the discontinuance of his wife's right.

(a) Perk.
474.

Bro. tit.
Curtesy, (1.)

A woman, tenant in tail general, marries; she and her husband levy a fine, and take back an estate to them and the heirs of their two bodies, and have issue, the husband dies, she marries another, and hath issue and dies, and the husband claims to be tenant by the curtesy, upon pretence, that by the estate taken back upon the fine his wife was remitted to her general tail, and so every issue inheritable, and he tenant by the curtesy; but *optima opinio*, that as his wife was estopped, so shall the second husband who claims by her.

Cro. Jac.
482. Cro.
Einz 128.
Charnock

Baron and feme seised of lands in right of the feme (whereof the husband was entitled to be tenant by curtesy) levy a fine, which was after reversed as to both, for the nonage of the feme, the

the husband shall have it again, as tenant by the curtesy, because the fine was utterly avoided. and Worley, adjudged.

[The husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy. 3 P. Will. Rep. 269. 276, 277. Steadman v. Palling, 3 Atk. 423.]

If by articles previous to marriage a woman grants to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, to maintain the house, &c., this does not abridge his legal rights, but he is entitled to curtesy both in such real estates as she had at the time of the marriage, and in what came afterwards.]

Customs.

- (A) Of the Commencement and Length of Time necessary to establish a Custom.
- (B) What Persons are affected with, or bound by a Custom.
- (C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Convenience of them, bind in particular Places.
- (D) Where, from the Benefits accruing from them, they shall bind.
- (E) Where, from the Certainty or Uncertainty of them, they shall be deemed good, or void.
- (F) How to be construed; and to what Things a Custom shall be said to extend.
- (G) Custom, how destroyed.
- (H) Of the Manner of alleging and pleading a Custom.

(A) Of the Commencement and Length of Time necessary to establish a Custom.

Co. Lit.

110. b.

Dav. 32.

(a) That all laws bind by the assent of the people, and such assent may be expressed as

well by acts as by writing or word. 44 E. 3. 19. Dav. 32. (b) The difference between custom and prescription is, that custom is local, as prevailing in a certain province, county, hundred, &c. but prescription is for the most part personal, being made in the name of a certain person and his ancestors, or those whose estate he has, or of a body politick, and their predecessors. Co. Lit. 13. b. 6 Co. 60. 8 Co. 62. & vide 2 Bull. 206. Roll. Rep. 46. [But a prescription may be laid by way of custom, where the necessity of the case requires it; as, in case a copyholder claims a right of common out of the manor, he must lay a prescription in the lord; but where he claims common in the waste of the lord, as he hath strictly no inheritance in the land, but is only tenant at will, and as a prescription must always be laid by way of a *quod estate*, which he cannot allege, not being tenant in fee, for in strictness the fee-simple is in the lord; therefore, the law allows him to allege it as a custom in the occupiers of such an estate. 6 Co. 60. b. Ca. temp. Hardw. 293. So, where a man claims only a discharge in his own soil, or a mere easement in the soil of another, he may lay it by way of custom. *Ibid.* So, matters of personal privilege or exemption may be laid generally to express the nature and extent of such privileges; either as having respect to place, as, all the citizens of London, Hob. 36. or to condition, as all sergeants at law, all attorneys, &c. 1 Vent. 386.—Another difference to be remarked between custom and prescription, is, that the latter must always have a legal origin; it must be of such things as may be created by grant, reservation, or deed: whereas it is not always necessary that the cause or consideration on which the former is founded should appear. 6 Co. 60. b. 1 Vent. 387. Cowp. 47. Dougl. 126. Hence, the corporation of London having a customary duty on corn imported, it was holden to be a good custom, that factors free of the corporation shall receive to their own use that part of the duty which arises from corn consigned to them as factors; though neither the commencement, nor consideration of such custom could be traced. *Cockfedge v. Fanshawe*, B. R. Dougl. 119. affirmed in the Exchequer-chamber, and afterwards in the House of Lords. Printed cases of the lords, 15th June 1783.] (c) *Consuetudo ex certa causa rationabili usitata privat communem legem.* Lit. § 37.—[But no man can allege a custom or prescription against an act of parliament; as, that every pound of butter sold in a particular market shall weigh eighteen ounces. *Noble v. Duell*, 3 Tenn Rep. 271. However, a man may prescribe against an act of parliament, when his prescription or custom is saved or preserved by another act of parliament. Co. Lit. 115. a. And Lord Coke makes a difference between acts in the negative and in the affirmative: for a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law. 2 Inst. 200. And he observes a difference likewise between statutes that are in the negative, for if a statute in the negative be declarative of the antient law, a man may prescribe or allege a custom against it, as well as he may against the common law. Co. Lit. 115. a. See Mr. Haigrave's annotations on this part of Lord Coke's commentary. See also 2 Mod. 39.]

Co. Lit.

110. b.

(d) The continuance

of an usage from the reign of R. 1. which being the time of a limitation of a writ of right, is said to be a good title of prescription. Co. Lit. 113. That laying a custom for forty years is naught though it was said that it might have been for more years, and so time out of mind.* *Skin.* 108. pl. 8. 109.—That customs may be time out of mind, though not coeval. *Salk.* 203. pl. 1.

46 E. 3. 16.

Pro. Entry.

5 Co. 69.

Co. Lit. 114

[(e) This

doctrine is

controverted

by a late

writer. 2 Wooddes.

51.]

Hence it is, that though a lord of a manor may have waifs and strays by prescription, yet he cannot have the *bona felonum* & *fugitivorum* without grant from the king; because no man can prescribe for them, for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without record (e), which presupposes the memory of that continuance.

(B) What Persons are affected with, or bound by a Custom.

THE king only, by his prerogative, can make a corporation, conservator of the peace, &c., therefore in these, or in other things which (a) highly touch the king's prerogative, no title can be gained by custom or prescription, as consuance of pleas, to have a sanctuary, to make a corporation, coroner, conservators of the peace, &c.

rogative is void. Dav. 33. [The objection to a custom, that it interfered with the king's prerogative, was grounded on the maxim "*nullum tempus occurrit regi*," and as that maxim is now abrogated by 11 Geo. 3 c. 16. the objection seemeth to be at an end.]

Co. Lit. 114.
Roll. Abr. 566.
(a) A custom that exalts itself above the king's prerogative.

But treasure trove, waifs, estrays, wreck, to hold pleas, courts-leet, hundreds, infangthef, outfangthef, a park, warren, royal fish, fairs, markets, frankfoldage, keeping of a gaol, toll, &c., may be claimed by prescription, without any matter of record; and a county palatine may be claimed by prescription, and, by reason thereof, *bona felonum*, &c. Also, a corporation may be by prescription.

Also, customs that bind private persons do not extend to the king; therefore, if lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure corona*; therefore it shall attend the crown, and consequently go to the eldest son.

So, the custom of *London*, as to retaining goods mortgaged till satisfaction be made of the money lent on them, extends not to the king's jewels.

So, if a man hath toll, or wreck, or strays, by prescription, this extends not to the king's goods.

A custom may extend to and give an (b) infant a power of doing that which by the rules of the common law he could not do, as an infant at the age of fifteen may make a (c) feoffment of lands of the nature of (d) gavel-kind; but this, like all other customs, is to be construed strictly, and in such manner as that no prejudice may accrue to the infant thereby; and therefore such feoffment must be for (e) valuable consideration; must be made in (f) person, and not by attorney; cannot be with (g) warranty; must be of lands which (h) descended to him in gavelkind, and not of lands by purchase; and must be of lands in (i) possession, not in remainder or reversion.

(d) Lamb. 624. (e) And. 193. Lamb. 625. (f) Lamb. 628. (g) Roll. Abr. 568. (h) Bendl. 33. pl. 52. Lamb. 627. (i) Bendl. 33. pl. 52. Lamb. 627.

It is a good custom in a copyhold manor, that a feme covert, with or without the consent of her husband, may devise her (k) copyhold land to her husband, or whom she pleases.

3 Leon. 81. 83. 2 Brownl. 218. [Vide supra, Vol. I. 725.] (k) But of such a custom as to freehold lands, &c. & vide 4 Co. 61. b. And. 152. Roll. Abr. 563. pl. 6.

Co. Lit. 114. b.

Plow. 205. a. Co. Lit. 15. b. Raym. 77. Sid. 138.

35 H. 6. 26. Dav. 33. b. Roll. Abr. 566. 2 And. 152. Dav. 33. b.

(b) Dr. & Stud. 21. 5 H. 7. 41. Fitz. Custom, 9. 9 Co. 76. a. (c) By the custom of a town an infant may bind himself apprentice. 9 H. 6. 7. 8. Bro. Custom, 63.

(b) Bendl. 33.

Moor, 123. pl. 268. Godb. 14. 143.

(C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Conveniency of them, bind in particular Places.

EVERY custom ought to appear to have had a reasonable commencement, and that at first it was voluntarily agreed to, for the better promoting of trade and commerce, the suppression of fraud, the greater security of men in their estates and possessions, &c., and in such cases, though the custom be contrary to the common law, or against the interest of a particular person, yet it shall be good.

Dav. 32. b. *Rule of the Customs of Gavelkind, Borough-English, Copyholds, Regulation of Corporations, Commons, chusing constables, church-wardens, &c. the several heads.*

21 E. 4. 28. As a custom that a man, in ploughing his own ground, may turn the plough on the ground of his neighbour; for this is for the general good, being in favour of husbandry and tillage, although a particular person receive prejudice thereby.

Bro. Custom, 51.
Roll. Abr. 560. Dav. 32. b. S. C.
5 Co. 84.

So, a custom to dry nets upon the land of another; for this is in favour of fishing and navigation.

Dav. 32. b. So, a custom to build bulwarks on the lands of another for the safety of the kingdom, is good.

Dyer, 60. b.

Dav. 32. b. So is a custom to pull down the house of another, to prevent the spreading of fire.

Wiggleworth v. Dallison, Dougl. 201. [It is a good custom, that tenants, whether by parol, or deed, (a) shall have the away-going crop after the expiration of their term; for it is for the benefit and encouragement of agriculture.]

(a) For the custom in such case does not alter or contradict the agreement in the deed: it only superadds a right which is consequential to the taking. *Ibid.* In Doe v. Snowden, 2 Bl. Rep. 1225. it is said by the court, that if there is a taking from old Lady-day (5th April), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2d Feb.), to prepare for the Lent corn, *without any special words for that purpose* in the lease.

Lewis v. Harris, Cor. Skynner, C. B. Hereford, Summer Assizes 1778. So, a custom that the tenant may leave his away-going crop in the barns, &c., of the farm for a certain time after the expiration of the lease, and his quitting the estate, is good.

Beavan v. Delahay, 1 H. Bl. 5.

Eastcourt v. Weekes, 1 Lutw. 799. A custom, that the executors and administrators of every customary tenant for life, if he should die between *Christmas* and *Lady-day*, shall hold over till the *Michaelmas* following, seemeth to be good.

Mod. 202. It is a good custom in a manor, that the homage have used yearly to chuse two surveyors, to take care that corrupt victuals are not sold within the manor, and to destroy such as they find exposed to sale there; for the preservation of men's health is designed thereby, and it is at the peril of the surveyors if they destroy any meat that is not so.

Vaughton and Atwood, 2 Mod. 56. S. C.

Cro. Jac. 555. Wallis's case, P. A custom in *Ipswich* to chuse yearly two burgesses, who used yearly to make a feast, and to fine those who refused to make a feast,

feast, and to imprison them till paid, was allowed a good custom, 1 Bur. 239. upon an *habeas corpus*, and the prisoner remanded.

It is a good custom, that every man of the town, that hath an house next adjoining, and abutting to the high street, may sell all merchandizes in his shop within the said house in the time of the market, which is held in the high street. Roll. Abr. 560. But vide 8 Co. 127.

A custom in *Exeter*, that every woman taken in adultery should be (a) whipped, is good. 8 Co. 126. [No mention is made of such custom in the book referred to.] (a) That a skimmington, or riding, where a woman cuckolds her husband, is a custom against law, vide 3 Keb. 578. Raym. 401. And note that such riding has been held by Holt, C. J. a libel, vide tit. *Libel*.

A custom, that a feoffment by tenant in tail with warranty shall not be a discontinuance, is good; although this is against the (b) rule and maxim of the common law. 30 Aff. pl. 47. (b) So, that a woman shall

not have dower where she received, during the coverture, part of the money for the sale of the land. *Err. Customs*, 53. — So, that a widow who marries shall not have dower. Roll. Abr. 562. — But a custom that the wife of a tenant in fee shall not have dower, is void. Dav. 46. b. — So, that the wives of Irish lords shall, during coverture, have the sole property of certain goods, to dispose of them without the assent of the husband. Dav. 50. b. Roll. Abr. 563.

But every custom which appears to have been unreasonable in (c) itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to a particular person; or to owe its commencement to the arbitrary will and oppression of a powerful lord (d) and not to the voluntary agreement of the parties, is void; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation. Dav. 32. b. 6 Mod. 124. Salk. 203. (c) That a custom against the law of reason, is void. vide Moer, 588. Bridg.

11, 12. 1 Leon. 217. 314. 3 Leon. 41. [(d) Upon this principle, a custom for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals upon the land near such pits, such land being customary tenement, and parcel of the manor. there to continue, and to lay and continue wood there, for the necessary use of the pits, and to take coals so laid away in carts, and to burn and make into cinders coals laid there, at their pleasure, was adjudged to be void. It was also adjudged void for uncertainty the word *near* being too vague and loose to support such a claim. *Wilkes v. Broadbent*, 1 Will. 63. 2 Str. 1224.]

A custom within a parish, that all lambs fallen and bred upon one tenement in the same parish, though belonging to several owners, shall be reckoned together, as if but one man's, and the tenth, so counted together, paid for tithes, is void and unreasonable; for by this means it might happen that a man might have but one lamb, and that should be taken for tithe; and he that had more should pay nothing. Hob. 329. Barker and Cocker, adjudged.

A custom to elect a supernumerary before any vacancy, to be admitted upon the death of the next prebendary, is ridiculous and void. Skin. 45. pl. 17. 2 Jon. 199. S. C.

A custom that no commoner shall put his cattle into the land before the lord, is void; for a custom that leaves it to the arbitrary will of the lord, whether the tenant should ever enjoy any benefit by the common, or not, can never be presumed to have had a reasonable commencement. Roll. Abr. 560. Dav. 32.

So, a custom that the lord of the manor shall detain a distress taken upon the demesnes till a fine at his will is paid for the damage, is void. Lit. § 46. Dav. 33. a.

A custom,

Lit. § 209. A custom, that every tenant of a manor that marries his daughter without the licence of the lord, shall pay a fine, is against reason, and void; for every (a) freeman may marry his daughter to whom he pleases.

hold. in bondage, the freehold being in the lord, shall pay such fine, is good. *Co. Lit.* 140. a.

Co. Lit. 59. b. If the lord of a copyhold by custom claims to have a fine of the copyholder, upon every alteration of the lord, be it by alienation or otherwise, this is a void custom as to the alteration or change of the lord, by the act of the lord himself; for by such means the copyholders might be oppressed by the multitude of fines by the act of the lord.

But for this *vide tit.*
Copyhold.

Falm. 211. A custom, that the lord shall have common in all the lands of his tenants for life or years lying fresh, is void, for it is against law that the lessor shall have common against his own lease, because it is part of the thing demised; *aliter*, of an heriot, which is collateral.

White and Sayer, adjudged.

Roll. Abr. 561. A custom, that the lord may take for his heriot (b) the beast of a (c) stranger, levant and couchant upon the land of the tenant, is not good.

2 And. 153.
(b) So, where

the custom was laid, that if the tenant hath none, or the best beast is esloined, the lord has used to take the best beast levant and couchant upon the land. *Moor* 16. *N. Bendl.* 112. adjudged.—But that the cattle of a stranger may be distrained for an heriot, but not seized, *vide N. Bendl.* 302. pl. 294. *Dalf.* 61. *Ow.* 146. *March* 165. (c) A custom that the lord shall have the best beast of every person dying within his manor, which is found there, is naught; for between the lord and a stranger it could have no lawful commencement, though between the lord and his tenants it may be good. *Cro. Eliz.* 725. adjudged. *Roll. Abr.* 266.

43 E. 3. 32. A custom, in a town, for a lord to enter into the (d) lands of his tenant till an agreement made for the arrears, when the tenant ceases for two years, is not good; for it is an ill usage to oust a man of his inheritance without action or answer.

2 Inst. 56.
(d) But if this custom had extended itself into many towns it had been good. *43 E.* 3. 32. *Roll. Abr.* 559.

Roll. Abr. 561. A custom, that the lord of the manor shall have 3 l. for every pound breach, of every stranger, is not good; (e) but it is good against the tenants of the manor.

Dav. 33.
(e) So, of a custom, that if a tenant makes a rescous, or drives his cattle off the land when the lord comes to distrain that he shall be amerced by the homage, &c. *Godb.* 135.

Cort v. Birkbeck, *Dougl.* 278. [A custom, that the inhabitants of a manor shall grind all their corn, grain, and malt, which by them, or any of them, shall be used or spent ground within the manor—at certain mills, is good. But if it were, that they should grind—all their grain whatsoever by them spent or fold—at certain mills, it would be void.]

Fryer v. Johnson, *2 Will.* 28. A custom in a parish, that every parishioner shall bury his relations in the church-yard as near as possible to their ancestors, is bad.]

Roll. Abr. 564. As to particular customs relating to the proceedings in inferior courts, such as have prevailed time out of mind, and are in furtherance of justice, seem to be good; but such as are in delay of justice, and tend to oppression and injustice, and are against the general rules of law and reason, have always been held void.

Cro. Eliz. 125.

Hence it is, that a custom in an inferior court, that when any man comes to the grand distress in any plea, and it is returned that he is distrained by his goods, & *quod nihil habet ulterius per quod distringi potest*, that his goods shall be delivered to the plaintiff, finding security, that if the suit passes for the defendant, that he shall have again his goods; and that if it passes for the plaintiff, that he shall have them, has been held good. Roll. Abr. 564. in Maidstone in Kent.

So, a custom in the county palatine of *Chester*, that if judgment be given in a bafe court there, and thereupon a writ of error be brought before the chief justice there, and he reverse the first judgment, costs shall be given to him at whose suit it is reversed, is good. Roll. Abr. 564.

So, it is a good custom in an inferior court, that in an action of debt, if the defendant does not deny the debt, but *petit quod inquiretur de vero debito secundum consuetudinem*, that a jury may be returned that shall try it, and if they find it to be a true debt, that the plaintiff shall have judgment thereupon. Roll. Abr. 564. Cro. Eliz. 894. Roll. Rep. 193. Mod. 96. S. P. adjudged.

and said by Hale, Ch. Just. that this cause prevented a suit in Chancery.

But a custom in an inferior court, upon a judgment in the same precept, in the nature of a *capias ad satisfaciendum*, to give a warrant to the bailiff to take the principal in execution, if he may be found, and in his default to take the bail, is not good; for it is (a) against law to take the bail before a *capias* returned against the principal, and (b) a *scire facias* against the bail. Roll. Abr. 563. (a) For this reason a custom in an inferior court, which is not within the statute of 32 H. 8. to grant a *tales de circumstantibus*, is void. Roll. Abr. 463. 564. — So, to award a *capias* in debt before any summons. Roll. Abr. 563. 780. (b) That the custom of London to take the bail without a *scire facias*, is void. Cro. Car. 561. Palm. 567. Cro. Eliz. 185. 2 Leon. 29.

A custom in an inferior court to try issues by six jurors, is not good, though many courts have used it, and many judgments depend thereupon. Roll. Abr. 564. Tredinwick and Peryman, adjudged, in a writ of error upon a judgment in Bodmyn in Cornwall. Cro. Car. 259. S. C. adjudged; and said by Jones, that although in some parts of Wales there be such trials by six only, it is by reason of the statute of 34 & 35 H. 8. c. 26. which appoints, that trials may be by six only, where the custom hath been so. 1 Sid. 233. S. P. per Cur.

A custom in a leet, that if the petit jury make any (c) false presentment, and it is found false by the grand inquest, that the petit jury shall be amerced, is void; for this is against common right and extortion. 6 H. 6. 44 b. (c) But a custom that, if they conceal any

thing that ought to be presented, they shall be amerced, is good. 9 H. 6. 44. Roll. Abr. 560.

If there be a custom in an inferior court, that if a man brings an action against another there, and the defendant appears and pleads to issue, and, at the day of trial, the defendant, being solemnly called, does not appear, nor find pledges *qui eum manucapere voluerint*, to have his body from court to court, at every court there after to be held, till the plea be determined, as he ought by the custom, but in contempt of the court *recessit & defaultam fecit*; and judgment is thereupon given; yet this is not a good custom, but utterly unreasonable; but they ought according to law to take the inquest by default; for if he had appeared and stood Roll. Abr. 564. Burges and Spark, adjudged; and such judgment given in Plymouth reversed accordingly.

staid in prison without finding pledges, yet they ought not to have given judgment against him if he would have pleaded to issue.

Moor, 603.
pl. 834.
Paramour
and Veral,
2 And. 151.
S.C. & vide
Moor, 588.
Palm. 56.
2 Inst. 204.
Sid. 355.

It is no good custom in *Sandwich*, that, if the goods of a freeman of *Sandwich* come into the hands of a freeman of *London*, the mayor of *Sandwich* shall write to the mayor and aldermen of *London*, to call the party before them, and take order for the restitution; and if they refuse, or return no answer to the mayor and jurats, the mayor of *Sandwich* shall write *alias* & *pluries*, and after give judgment of *Withernam* against the mayor and commonalty of *London*; which shall be signified to the mayor of *London*; and if he make not restitution in fifteen days, then those of *Sandwich* may retain the body of any *Londoner* that comes there, till restitution.

Cro. Jac.
357. ad-
judged.
(a) So, a custom to give judgment in a personal action upon four defaults before appearance, is void.
Style 124.

A custom in an inferior court, to give a day to one that hath (a) made default, is void and against law.

(D) Where from the Benefits accruing from them they shall bind.

6 Mod. 124.

Wherever the party bound by a custom has some benefit by it, or the party, who claims the advantage of it, is at some charge thereby, the custom is good.

Cro. Eliz.
569.
Moor, 355.
Roll. Abr.
559. S. C.

Hence it is, that a custom, that the parson of the parish should find a bull and a boar for the use of the parish, and in consideration thereof should have the tenth of the increase, has been held good.

Cro. Eliz.
203. Sir
George
Farmer and
Brook, ad-
judged.
Leon. 143.
S. C. debat-
ed. Owen,
67. S. C.
adjudged.
c. nt.

So, a custom, that whereas *J. S.*, is seised in fee of the manor of *T.*, and all the tenements in the said town are held of the said manor, that he and all those, &c., have had, time out of mind, &c., a bakehouse, parcel of the said manor, maintained at their charge, and that this bakehouse was sufficient to bake bread for all the inhabitants, and for all passengers through the said town; and the bread there baked had used, &c., to be sold at reasonable prices, and that no other person within the said town had used to bake any bread to sell to any person; this is a good custom, (b) though it restrains other men to exercise their trades within a certain place, for this might have a reasonable beginning to bind his own tenants, as it only does.

8 Co. 125.
3 Bull. 61.
2 Bull. 195.
Roll. Abr.

559. S. C. cited. (b) A custom in Winchester, that none shall exercise a trade there who is not free of the city, or brought up apprentice there; *Q.* if good. Salk. 203. pl. 2. & vide 3 Co. Wagonner's case. * It may be good if founded on some consideration. Vide Mo. 342. Sti 111. 2 Lev. 210. 3 Lev. 241. — A custom, which restrains trade *sub modo*, may be good: and therefore the custom of foreign bought, and foreign sold, whereby a man not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city, &c. is good. Dy. 279. b. R. Jon. 162. Adm. 2 Roll. Abr. 202. c. 45. — A custom, that none shall use a trade there, unless he be free of the guild R. in London, 8 Co. 125. Dub. Whether good in another city. 1 Salk. 204. Mod. Ca. 21. — [In the case of the city of Oxford, it was ruled, upon the authority of Wagonner's case, 3 Co. 25. b. that a custom in that city, by which every person not being a freeman of the city, who exposes goods to sale in the city, except in fairs or markets, is liable to a penalty, is good, notwithstanding there were no exception of victuals; and that a custom to distrain for the penalty was also good. Moir v. Munday, Say. Rep. 181.] — A by-law, that no one shall use a trade in a borough, not free there, where the by-law is founded upon a *custom* to such intent, though the custom be not confirmed by parliament, is good. Adm. Lut. 564. Adm. Gedd. 254. 8 Co. 125. a. Now every day's experience warrants this doctrine. *

A custom,

A custom, that every inhabitant of an antient messuage held of the bishop in the city of S., have ground at the bishop's mill all their grain spent in their houses, and that the bishops, in consideration thereof, have time out of mind kept servants to grind and carry, &c., is good, because mutual considerations and mutual actions will lie.

Roll. Abr. 559. 2 Bulst. 195, 196. Hard. 67. Lev. 15. Vent. 168. 2 Sand. 117. Carth. 193.

A custom, that the corporation of *Litchfield* have had a market there time out of mind, &c., and that the corporation ought to repair the way to it, and to appoint a bellman, who ought to sweep the market-place, and in recompence thereof, the said bellman, time out of mind, &c., from those that brought their grain to the said market, and untied their sacks there to sell it, had used to take a pint of grain if it was but one bushel or under, but if it was above a bushel, then a quart, to the use of the said corporation; this is a good custom, for the men that are charged by it have a reasonable benefit thereby.

2 Bulst. 201 205. Roll. Rep. 1, 2. 44. 46. S.

It is no good custom, that the city of *Norwich* hath time out of mind maintained a quay for unlading goods brought up the river to the city, and that every vessel passing through the river by the quay had paid a certain sum; for the vessels that unlade not at the quay or other place in the city, have no benefit from the maintenance of the quay.

reason for it, if it had appeared that they cleansed the river.

If a lord of a manor, which extends itself upon the banks of part of a river only, hath time out of mind maintained a quay for the lading and unlading of goods, and kept a bushel within the manor for the measuring, and other merchandizes, he cannot prescribe *ratione inde* for a bushel of salt, of every ship sailing in the river, for the repairing of the quay; and keeping a bushel within the manor, cannot warrant the taking of toll out of the manor, for goods not brought to the quay within the manor, though brought to another place within the same river.

It is a good custom, that the mayor and commonalty of *London* have had of every master of a ship 8*d.* per tun, in the name of weighage, for every tun of cheese brought from any place in *England* to the port of *London*; for the liberty of bringing it into the port, which is a place of safety, is a sufficient consideration; and the mayor and commonalty have the view and correction of the river *Thames*.

The lord of a manor may prescribe to keep and repair a wharf within the manor, & *ratione inde* to have toll of all goods landed within the manor, though not upon the wharf; for the landing upon the soil is an easement; and all the lands in the manor were the lord's originally, and this is in nature of a (a) toll traverse.

(a) For this vide 2 Roll. Abr. 522.

[The corporation of *Malden* in *Essex* prescribed in a *que estate* "that they and all those, &c., time whereof, &c., had used to re-

Roll. Abr. 561. But for this vide F.N.B. 271. Reg. 153. Hob. 189. Moor, 887. Style, 421. 2 Lev. 27.

Roll. Abr. 561. Hill and Hawke, Moor, 835. S. C. adjudged, and that the custom was good, though the corn was not sold, but brought in to be sold. C. adjudged.

Vent. 71. Mod. 47. Halpait and Wills, S. C. that there would have been some Sid. 454.

2 Lev. 96, 97. Pridaux and Wain, Raym. 232. Mod. 104. S. C. adjudged. See 2 Stra. 1228. 1 Will. 91. infra (E).

3 Lev. 37.

3 Lev. 424. [Crisp v. Fellwood, Colton v. Smith, Cozp. 47. S. P.]

Cited by Holt. C. J. 1 Ed. Raym. 386.

“pair the port, in consideration whereof, they had used time
“whereof, &c., to receive for all lands sold within the precinct of
“the borough, a certain rate of 10*l.* in the pound out of the purchase money:” it was adjudged a good custom; and this is what they call *land-cheap*; for the land-holder reaps a benefit by the trade coming to the town, by reason of the port.]

5 Lev. 307.
Simpson and
Bithwood,
adjudged.

It is a good custom within a manor adjoining to the sea, that in case of any shipwreck of any ship cast upon the manor *inter fluxum & refluxum maris*, the lord shall take care of the sick and wounded, and burial of the dead, and keep the goods there cast for the use of the proprietors; and in consideration thereof, shall have the best anchor and cable of the ship; for though charity obliges the lord so to do, yet it is not unreasonable that he should have a recompence of his charity and charge:—But 2.

Hil. 34 Car.
Bear and
Balling-
sham, 3 Lev.
85. S. C.
(a) That a
custom al-
leged by a
lord, that
whoever
broke his
pound should
pay him 3*l.*,
is a void cus-
tom as to
strangers;
for this,
among other
reasons: be-
cause there
is no pro-
portion be-
twixt the
damage and the recompence. 11 H. 7. 13. 14. 21 H. 7. 40. — But a custom alleged in Bucks, that if any swan cometh upon the land of any man adjoining upon the Thames, or upon any water running into the Thames, and there lays and hatches signets, that the owner of the land shall have one, was held a good custom; and yet the damage which the owner of the land sustains is but very small. 2 R. 3. 15, 16. 7 Co. in the case of swans. — * This case is very different from the preceding.

Carth. 357.
Vinkinton
v. Ebdon,
adjudged.
5 Mod. 359.
Salk. 248.
S. C. pl. 4.

By special verdict it was found, that by a custom in *Newcastle*, time out of mind, &c., a toll of five pence for every chaldron of coals there shipped off, was due to the corporation, in consideration of their charge in maintaining the port, which they were bound to do, and had done time out of mind; and that the custom was to distrain (for non-payment of this duty) any goods of the owner of such ships, which were distrainable by law; and it was held, that the charge of maintaining a port was a sufficient consideration, and that the finding that the corporation are bound to repair, &c., was sufficient, without finding that it was then in repair.

(E) Where, from the Certainty or Uncertainty of them, they shall be deemed good, or void.

EVERY custom ought to be certain, or such as may be reduced to a certainty, for an uncertain thing cannot be supposed to have had a reasonable commencement; also the uncertainty of a custom destroys the supposition of its continuance and duration time out of mind.

Roll. Abr.
565.
Dav. 33.
Skin. 249.

Hence it is, that a custom that when an infant is of such an age that he can count twelve pence, or measure an ell of cloth, that he may make a feoffment, is void for the uncertainty. and said, that such custom is not good, but that it ought to be at a certain age, that it may appear to be an age of discretion.

Dav. 33. a.
4 Leon. 82.
Hob. 225.
S. C. cited,

So, a custom, that the tenant of the manor who first comes to such a place, &c., shall have all the windfalls there, is void for uncertainty.

Roll. Abr.
565.
Dav. 33. a.

So, of the custom of *tannistry* in Ireland, which was, that the lands of that nature of which a man died seized, should descend *seniori & dignissimo viro sanguinis & cognominis* of him that died so seized; and it was held void, both for the uncertainty of the person and the estate.

Dav. 28. b.
to 42.

So, a custom alleged and found by verdict to pay ten pence to the vicar at the usual time of churching women, was held void for uncertainty.

Fitzgib. 55.
2 Ld. Raym.
1558.

So, of a custom for 24 parishioners, &c., to make a rate, and a certain proportion to be levied on such an hamlet.

2 Stra. 1145.

[A custom for *poor and indigent householders* living in *A.*, to cut and carry away rotten boughs and branches in a chase in *A.* is bad, the description of *poor householders* being too vague and uncertain.

Selby v.
Robinson,
2 Term Rep.
758.

A custom, that "when a tenant took a farm, in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years," was holden to be void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land inclosed.

Roe v. Lees,
2 Bl. Rep.
1171.

But a prescription for so much money for setting up a stall in a fair; and for ground near the stall, is certain enough, for the quantity of ground near a stall may be determined by the usage of the fair.

Bennington
v Taylor, 2
Lutw. 1517.
See Wilkes
v. Broad-
bent, *infra*.

So, a prescription to take "three *Winchester* bushels of barley out of and for every ship's cargo of barley brought upon a quay to be exported in any ship," is sufficiently certain, for the word *cargo* is a mercantile term, and very intelligible when referred to a ship.]

Sargent v.
Read, 2 Str.
1228.
1 Will. 91.
The pre-
scription in

Mr. Nolan's MSS. report, omits the words in italicks. See Nolan's edit. of Sir J. Strange's Reports.

(F) How to be construed; and to what Things a Custom shall be said to extend.

Roll. Abr.
567. 568.
11 Mod. 160.
Fide tit.
Gavelkind.

EVERY particular custom, that is derogatory from the common law, is to be construed strictly, because as far as the particular custom hath not derogated from the law, the general custom of the whole kingdom ought to prevail; and we are not to presume that the particular custom goes further than by notorious facts may appear.

Roll. Abr.
567. Cro.
Eliz. 434.
Moor, 411.
S. C. adjudged.
(a) Where inhabitants have used to have common to their houses, this extends not to a new house. Owen 4.

If the inhabitants upon a common have used time out of mind, &c., to dig clay in the said common of their lord, for the reparation of their houses standing upon the said common, and a stranger digs clay in the common, the inhabitants cannot take this clay from him, for this is not (a) within their custom.

Roll. Abr.
568. Cro.
Eliz. 789.
Yelv. 1.
Noy, 42.
Raym. 404.

If the custom of a manor be, that if any copyholder in fee surrenders out of court, and he to whose use it is surrendered, does not come in at the court to take his copyhold after three proclamations made, that then the lord may seize the copyhold as forfeited; and a copyholder in fee surrenders to the use of another for life, the remainder over in fee, and the tenant for life does not come into court to take his copyhold after three proclamations made, according to custom, upon which the lord seizes the copyhold as forfeited; and after *cestui que use* for life dies, he in the remainder shall not be bound by the not coming in of the lessee; for the custom being in destruction of an estate shall be taken strictly, and shall be intended of tenant in fee in possession, and not of him in remainder, as in this case.

2 Leon. 109.
2 Leon. 208.
S. C. cited to have been adjudged, because the custom extended only where the wife was a copyholder at the time of the marriage.

If there be a custom within a manor, that if a man takes to wife any customary tenant of the manor, and has issue, and overlives his wife, he shall be tenant by the curtesy; and a man marry one, to whom during the coverture a customary tenement descends, and have issue by her, and she die, yet he shall not be tenant by the curtesy.

Cro. Eliz.
803. adjudged.

If there be a custom in *London*, that none ought to intermeddle with the art of a weaver there, but only those who are free of the guild; if a stranger receive silk in *London*, and carry it to *Hackney*, and weave it there, and then bring it back again to *London*, and receive his pay for it, this is not any intermeddling in *London* against the custom, though the contract was made in *London*.

Style, 409. debated, but no resolution; &c. Roll. Abr. 609.

If there be a custom in the town of *Newcastle*, that the owners of houses there, but not tenants in tail, may devise them by parol, and a man be seised of an house there in tail, remainder to himself in fee-simple, he may devise the remainder; for the word *owner* is general, and comprehends all ownerships.

If there be a custom within a manor, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seised of, and a copyholder die, and his wife be endowed of a moiety, and his son and heir having the other moiety die, the wife of the son shall be endowed of the moiety of this moiety; for this is directly within the custom.

Raym. 58.
Baker and
Berisford.

If there be a custom within a town to have 2*d.* for every hide of every sheep, cow or ox, that is killed or sold within the said town, and for non-payment thereof to seize the hides, &c., the party that is to have the 2*d.* cannot by this custom justify the tanning the hides and converting them into leather.

Cro. Eliz.
783. Roll.
Abr. 569.

*General customs may be extended to *new things*, which are *within the reason* of those customs.

L.1. Raym.
499.
12 Mod. 271. 5 Co. 82. See 2 Jon. 204.

It is a general rule, that customs are *not to be enlarged beyond the usage*, because it is the usage and practice that makes the law in such cases, and not the reason of the thing.*

11 Mod. 160.
Fitzgib. 243.

(G) Custom, how destroyed.

A Title gained by prescription or custom cannot be lost by interruption of *possession* ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right or common, and the land charged therewith of an estate equally high and perdurable in both.

Co. Lit.
114. b.

If gavelkind lands are held in socage, and the tenure is after changed into knights service, yet the custom is not altered, for that goes with the land, and not with the tenure.

Dalf. 23.
Sid. 138.
Style, 476.

Lands in *Kent* were disgavelled by 31 *H. 8. cap. 3.* and a private act made 2 & 3 *E. 6.* enacted, that the lands of Sir *Henry Isles* amongst others, should be from thenceforth to all intents, constructions, and purposes, as lands at the common law, any custom to the contrary notwithstanding; and the question was, whether these lands lost by these statutes all their other qualities or customs belonging to gavelkind, as well as their partibility; and it was resolved that they lose only their partibility.

Raym. 59.
76, 77. Sid.
77. 135.
Lev. 79.
2 Keb. 288.
Hard. 325.
Cotton and
Wileman.
For the rea-
sons hereof,
vide tit. Gavelkind.

If lands of the nature of gavelkind, or borough english, escheat to the crown, and be enjoyed in several descents, and are afterwards granted out by the crown in knights service, yet they descend in gavelkind or borough english; for the law of those places cannot be controlled by the king's charter, or altered without an act of parliament.

(H) Of the Manner of alleging and pleading a Custom.

A Custom of devising lands, borough english or gavelkind, may be alleged in a city, borough, or manor, but not in an upland town, that is neither city nor borough; but a custom to have a

Co. Lit.
110. b.
But as to
the manner
of laying a

custom, and the difference between alleging a thing by way of custom, or by way of prescription, *vide* 6 Co. 60. Hob. 113. Cro. Eliz. 441. Poph. 201. Style 477. Lev. 176. Vent. 386. 3 Lev. 160. Carth. 192. 4 Mod. 342. 2 Lutw. 1317. *Supra* (A.)

Sid. 237. A custom for a way was laid *quod talis habetur consuetudo quod quilibet inhabitans haberit, &c.*, and the court held it naught, for it should be laid by way of fact triable, *viz. tempore cujus contrarium, &c., usi fuerunt habere**.
 Keb. 836. * The former way would do in a declaration. The latter is proper in a plea, &c.

Co. Lit. 175. b. The law takes notice of the (a) customs of gavelkind and borough english, and therefore it is sufficient to allege generally that the lands are of the nature of gavelkind, &c. But other private customs must be set forth in pleading, that the judges may be apprized of them, and where they obtain, and so give their decisions with a proper regard to them.
 (a) But as to such customs as are no part thereof, but merely collateral, they must be shewn in pleading, as that the lands are devisable. Lev. 80. Raym. 77. Sid. 77. 138. Cro. Car. 562. — So, if a man would entitle himself to be tenant by the curtesy, without having issue, or a woman to have dower of a moiety, it ought to be shewn specially, that time out of mind, &c. Sid. 77. 2 Sid. 154.

Godb. 183. One prescription or custom may be pleaded against another, where they are not inconsistent, but a prescription pleaded against another is not good without a traverse (b).
 2 Mod. 104. But for this *vide* Roll
 Abr. 558, 565. Yelv. 215. Bulst. 115. 3 Co. 127. Cro. Car. 432. Jones 375. [(b) One custom may be pleaded to another without a traverse, where the latter is not inconsistent with, but only a qualification of the former. Kenchin v. Knight, cited 2 Wils. 101.]

9 Co. 59. If one prescribes to have a way over the land of B., to his freehold, B. cannot prescribe to stop it.

2 Id. Raym. 869. * A custom ought not to be laid in the negative.

2 Id. Raym. 1134, 1135. In an action brought upon a custom, it should be shewn what the custom is, otherwise it is not maintainable.*

Customs of London.

3 Co. 127. THE ancient city of London being the metropolis and chief town for trade and commerce within the kingdom, it was necessary that it should have certain customs and privileges for its better government; which, though derogatory from the general law of the realm, yet, being for the benefit of the citizens, and for

for the advantage of those who trade to, and therefrom, have not only been allowed good by the judgments and resolutions in the superior courts, but (a) have also been confirmed by several acts of parliament *.

(a) *Magna Charta*, c. 2. 7 Rich. 2. &c. — * On a *certiorari* to the mayor

and aldermen to certify a custom, the recorder (in his purple cloth robe, faced with black velvet) certifies *ore tenus*, and then, on motion, delivers in the *certiorari*, with a written copy of the return annexed; the writ is filed, and the return recorded. *Plummer v. Bentham*, 1 Bur. 243 — If it is not furnished in the pleadings, that a custom ought to be tried thus, it shall be tried by the county. *Ibid.* [When a custom has been once certified by the recorder, the courts must take notice of it. They cannot have it certified over again. *Per Lord Mansfield*, Dougl. 380. However, if they are dissatisfied with a certificate, they may send it to be re-considered. 2 Vez 592. As the recorder certifies the return *ore tenus*, he is, of course, not bound to sign the copy of it. 3 P. Wms. 17. If the certificate be false, an action lies against the mayor and aldermen, and not against the recorder; for it is their certificate by the recorder. Hob. 87.]

As these customs are of various and different kinds, I shall consider them under the following division.

- (A) Of the Customs of *London* in general.
- (B) Of the Custom of *London* in respect to Orphans.
- (C) Of the Custom of *London* in respect to a Freeman's Estate: And herein,

- 1. What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.
- 2. Of the Childrens Part, and herein of Survivorship, Advancement, and bringing into Hotchpot.
- 3. Of the Wife's Part, and what shall bar her thereof.
- 4. Of the Legatory, or dead Man's Share.

- (D) Of the Custom of *London*, as it relates to Feme Coverts.

- (E) As it relates to Masters and Apprentices.

- (F) As it relates to Landlords and Tenants.

- (G) Of the Customs of *London* which are in furtherance of Justice, and for the more speedy Recovery of Debts.

- (H) Of the Custom of Foreign Attachment: And herein,

- 1. Of the Nature of the Debt or Duty which may be attached.
- 2. In whose Hands, and at what Time the Attachment may be made.
- 3. Of the Form of the Proceedings in a Foreign Attachment.

(A) Of the Customs of *London* in general.

Vent. 115. **I**F a freeman forestalls fish coming to a market within the city, and upon complaint to the court of aldermen, he appears there and confesses the fact, and they order that he shall desist, and he will not promise to obey, &c. they may (a) commit him until he signifies to the court that he will conform; and this is a good custom.

(a) Custom to commit for refusing to serve on the livery good. 2 Lev. 200. Raym. 447. Mod. 10. 2 Keb. 555. 5 Mod. 156. 319. — [So, a custom to exhibit an information by the common serjeant for opprobrious words spoken of an alderman, and on conviction to fine and imprison, is good. 1 Vent. 327. 2 Lev. 200. 2 Salk. 425. 2 Ld. Raym. 777. 7 Mod. 28. But a custom to commit in such case in the first instance, is void. Cro. El. 689.] So, a custom to disfranchise for contemptuous words spoken of an alderman, is void. 2 Lev. 200. 2 Salk. 426. — To imprison for disturbing the election of a warden of a company, and for not promising not to disturb again. Style 78. *dubitatur*. — To imprison until he takes the oath of an alderman of London, a good custom. March 179.

Roll. Abr. 546. **By** the custom of *London*, a freeman or citizen might, even before the statute of wills, devise his lands and tenements, of which he was seised in fee-simple, to whom he pleased, and may at this time devise the same in mortmain, notwithstanding the statute of mortmain, &c.

Roll. Abr. 557. **By** the custom of *London*, no attainder lies for a false verdict given in *London*.

S.P.C. 180. **A** citizen of *London*, upon an appeal, brought by him, shall not be obliged to wage battle.

Roll. Abr. 557. **It** is a good custom in *London*, that the mayor of *London* may take recognizances of any persons, being of full age, or women unmarried, (b) (for he is a judge of record,) although the debt was contracted out of *London*.

Chamberlain and Thorp; but *vide* Cro. Eliz. 186. and Leon. 130. S. C. [where Gawdy, J. held the custom not good, because it extended as well to strangers as to citizens.] (b) And the courts above will take notice hereof. Leon. 284.

Roll. Abr. 557. (c) **It** is a good custom in *London*, that they, time out of mind, have had the (c) measuring of coals *infra portum London*, which (d) extends from *Staines* bridge to *London* bridge, and from thence to *Gravefend*, and from thence to *Xenland* and *Yendale*.

Lev. 14, 15. — And a by-law founded on the custom of *London*, which directs that no freeman shall under a certain penalty, sell his goods unless weighed at the city beam good. Salk. 352. pl. 13. 5 Mod. 156. 6 Mod. 123. 177. 1 Ld. Raym. 498. (d) For this *vide* 4 Inst. 250. Sid. 148.

Roll. Abr. 550. (e) **By** the custom of *London* whores are to be carted, and therefore if a person calls a woman (e) whore (f) in *London*, an action on the case lies in respect to the punishment they are subject to by the custom; but the party (g) cannot be proceeded against in the spiritual court for defamation; for that would be punishing him twice for the same offence.

bastard, or son of a whore, or calling the husband cuckold, was, by implication, calling the mother or wife a whore. (f) If laid in *London*, when spoken elsewhere, the defendant may plead the words were spoke at, &c., and traverse the speaking in *London*; and if the plea is refused, may have a prohibition. Lev. 116. — That the action must be brought in the courts in *London*. Carth. 75. (g) Whether in such a case a prohibition may be granted after sentence? Cath. 213. [It cannot, unless the want of jurisdiction

jurisdiction appear on the face of the proceedings. *Blacquiére v. Hawkins*, Dougl. 378. In the case of *Argyle v. Hunt*, the court could not judicially take notice of the custom in London, for an action to lie for the word "whore;" probably, because it had never been certified by the recorder. And in *Stainton and wife v. Jones*, which came on to be tried before Lord Mansfield, at the sittings after M. 23 G. 3. at Guildhall, in an action on this custom for calling Stainton's wife a whore, the plaintiffs were nonsuited, not being able to prove the custom to call whores in London. A book from the town clerk's office was produced, but it contained no account of such custom. Lord Mansfield said, that he could not take notice of the custom unless proved. It was stated on that occasion, that the custom had never been proved in such a manner as to maintain an action in Westminster Hall; that in the city court, the action is maintained, because they take notice of their own customs without proof. Dougl. 380. notes (95, 96.)]

There (a) is a custom in London, that when a chaplain keeps any woman in his chamber suspiciously, a man may come to his chamber with the beadle of the ward, and enter the chamber and search.

2 H. 4. 12. b. Roll. Abr. 557. S. C. (a) The custom of London,

that if a villain abides in London for a year and a day, that he shall not be taken nor put out by writ *de nativo habende*, nor by any process thereupon issuing, is good. 7 H. 6, 32. 8 H. 6, 3. Roll. Abr. 557. S. C. Moor, 2. pl. 4. S. P. adjudged.

By the custom of London, if a man commit a horse to an hostler, and he eat out the price of his head, the hostler (b) may take him as his own, upon the reasonable appraisement of four of his neighbours; which is a custom arising from the abundance of traffick with strangers, who could not be known to charge them with actions.

Moor, 8-6. 3 Bullt. 271. Yelv. 67. Roll. Rep. 449. (b) But if a man leaves several horses

with an inn-keeper in London, and takes them all away except one, the inn-keeper cannot retain the horse so left till he is satisfied for the keeping of the other horses, unless there was an agreement to that purpose. Bullt. 207. — So, if A. commit the horse of B. to an hostler in London, and he eat out his head, yet cannot the hostler sell him; for all customs being derogatory to the common law, are to be taken strictly; and there is no custom of London that hath gone so far as this case, to authorize one man to sell and convey the property of another. 2 Roll. Abr. 85.

It was (c) anciently insisted upon, that by custom all indictments and proceedings for any cause, except felony, should be tried and determined in London, and not elsewhere; but (d) it seems to be now admitted, that a *certiorari* lies to remove any indictment from London; but (e) it is said, that by the (f) city charters, the tenor of the indictment only shall be removed, and not the indictment itself.

(c) Cro. Car. 128. (d) Raym. 74. 3 Mod. 230. Hard. 409. 6 Mod. 246. & vide 5 & 6 W. & M. c. 11.

(e) Keb. 252. Sid. 155. (f) That by the city charters the mayor shall be a principal in every commission. 3 Inst. 72. 2 Rich. 3. 11. a.

Besides these and several other customs, there is a general custom which is usually set forth by the city, when any of their proceedings is called in question, viz. That (g) if any of their customs heretofore used prove hard or defective, or if any thing newly arising within the city where remedy was not before provided, should need amendment, in either of these cases, the mayor and aldermen for the time being, with the assent of the commonalty, may ordain a fit remedy thereunto, so as such ordinance be profitable to the king, for the profit of the citizens, and agreeable to reason.

(g) What ordinances, by-laws, &c. made by virtue of this custom, are good, &c. vide 8 Co. 126. Waggoner's case, Skin. 371., &c. — That none but

a freeman shall exercise a trade, and that a freeman bred up to one trade, may exercise another of the same nature, vide Cro. Car. 516. Roll. Rep. 10. Sand. 311. Sid. 427. 4 Mod. 145. Vide tit.

By-Laws *.——* By various charters the citizens of London are free from toll, &c. throughout the kingdom, are excused from juries, &c. out of the city. [But this exemption from toll can be claimed by *resident freemen* only. *Rex v. Hanger*, 3 Bullst. Hargr. Law Tracts, 128. Corporation of London v. Corporation of Lynn, 4 Term Rep. 130.] And a jury of citizens may waive their privilege, and consent to be sworn on a trial at bar in Middlesex. *Lockyer v. East India Company*. 2 Wils. 136.——As to the erection of edifices. A man may heighten his old messuage, or house, or re-build on the old foundation to what height he pleases, but of no other erection or building, so as to stop his neighbours lights. *Plummer v. Bentham*. 1 Bur. 248.——[And he cannot stop ancient lights by an erection upon a new soil, or beyond the old foundation. *Priv. Lond.* 56. For the repair of his house, a man may, by custom in London, set his poles and ladders upon the soil, or house of another adjoining. But he cannot break the house or soil. *Id.* 59.]——As to the buildings see further 11 Geo. 1. c. 28. & 14 Geo. 3. c. 78.——[The former statute is confined to party-walls between houses, and does not extend to party walls between stables. *Rex v. Pratt*, 4 Burr. 2298.]——With respect to trade. It is a good custom that the portage of corn, roots, &c., belongs to the city from Staines Bridge to Yendal in Kent, and the by-law is good, that none but the company of free porters shall carry it, on penalty of 20 s. *Fazakerly v. Wiltshire*. T. 7. G. *Ludlam v. Bradley*, P. 13 G. in C. B. *Robinson v. Webb*, T. 2 G. 2. B. R. 1 Stra. 462.——It is a good custom, that persons to be admitted to the freedom be obliged to swear on the *New Testament*. *Rex v. Bosworth*, 2 Stra. 1112.

(B) Of the Custom of *London* in respect to Orphans.

Hob. 247. **I**F any freeman or freewoman die, leaving orphans under age
Roll. Abr. unmarried, the custody of their bodies and (a) goods, by the
550. S. C. custom of *London*, belongs to the city, and their executors or ad-
 (a) Though ministrators must exhibit true inventories of all their goods and
 given them chattels, and must (b) bind themselves to the (c) chamberlain to
 as a legacy the use of the orphans, to account for the same upon oath; which
 by other if they refuse to do, they may be committed: also, (d) if the ec-
freemen. clesiastical court will compel them to account there, against this
Hutt. 20. custom, a prohibition lies.
 —Or in a foreign county.
Vent. 180. (b) Although they have already acknowledged a judgment at common law for the securing,
 &c. *Roll. Abr.* 550. *Hutt.* 20. S. P.——So, although they have given security in the prerogative
 court, yet they may be compelled to give new security to the chamber of London. *Roll. Abr.* 550.
 (c) For what purpose he is a corporation, and such securities shall go to his successor, who may sue the
 time. *Cro. Eliz.* 464. (d) 4 Inst. 242. S. P. But an infant may waive the benefit of suing in the court
 of orphans, and file a bill against one for the discovery of the personal estate. March 107.

Roll. Rep. If a freeman of *London* leaves *London*, and resides in the coun-
 316. try, yet his children, though born out of *London*, shall be orphans,
Sid. 250. and subject to this custom.
Vent. 180.
Mod. 80. 2 Vern. 110. S. P.

Sid. 250. If such orphan is taken out of the custody of such person, to
Rayn. 116. whom he is committed by the court of orphans, they may impris-
Lev. 162. on the offender till he produces the infant, or is delivered by
 course of law.

2 Lev. 34. Also, by this custom, if (a) any one without the consent of the
 The King court of aldermen, marry such orphan (b) under the age of
 and Har- twenty-one, though out of the city, they may fine and imprison
 wood. him for non-payment thereof; for if the custom should not
 2 Vent. 178. extend to marriages out of the city their power would be but in
 S. C. vain.
 1 Mod 77.
 79 S. C.

(e) Though not a freeman. *Vent.* 178. *Mod.* 79., and the above authorities. (f) Whether the mar-
 riage was before or after twenty-one, the husband is fineable, and may be committed if he had not the
 licence of the court of orphans. *Preced. Chan.* 537.

"The orphans money in the chamber of *London* is not a mere *deposittum*, but in nature of a debt, or chose in action, which does not vest in the husband by the marriage of such orphan, nor can he bequeath it by will.

2 Vent. 340. [The chamberlain pays interest for the money.
1 Ch. Ca. 182. S. C.] Preced. Chan. 209. S. P. adjudged.

(C) Of the Custom of *London* in respect to a Freeman's Estate: And herein,

What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.

HERE it is necessary in the first place to take notice, that by the custom of *London*, if a freeman of *London* dies, leaving a widow and children, his personal estate, after his debts paid, and the customary allowance for his funeral, and the widow's chamber being first deducted thereout, is by the custom of the said city to be divided into three equal parts, and disposed of as follows, *viz.* One third part to the widow, another third part to the children unadvanced by him in his life-time, and the other third part such freeman may dispose of by his will as he pleases; but if a freeman of *London* has no wife, but has children, the half of his personal estate belongs to his children, and the other half the freeman may dispose of; so if the freeman has a wife and no children, half of his personal estate belongs to his wife, and the other half he may dispose of.

1718, before Lord Parker, it was said, that the widow is entitled to the furniture of her chamber; or in case the estate exceeds 2000*l.* then to 50*l.* instead thereof. Vin. Abr. tit. *Customs of London*, (B. 2. p. 2.)]

This custom extends only to the personal estate of the freeman, for when it first begun, the citizens of *London* had no regard at all to a real estate, for they did not suppose any freeman of *London* would purchase such estate, but would employ his whole fortune and stock in trade, for the benefit of commerce.

But if a freeman of *London* has a mortgage in fee, this shall be counted part of his personal estate, and will be subject to the custom.
out of the personal estate, in preference to the customary or orphanage part; because the custom of *London* cannot take place till after the debts are paid. 2 P. Wms. 335.]

But a lease for years waiting on the inheritance shall not be reckoned part of a freeman's personal estate, but shall, together with the inheritance, descend to the heir at law.

[Neither shall receipts in chemistry, physick, &c. be reckoned part of his estate.]

Also, if a freeman of *London* agrees to lay out money in the purchase of lands, and to settle the same on his eldest son, &c. this shall not be reckoned part of the freeman's personal estate. S. P. adjudged; for by the agreement the money is to be looked upon as lands in equity, and therefore not subject to the custom.

Abr. Eq.
151. be-
tween Grice
and Good-
ing, decreed.

On the marriage of *B.*'s daughter with *A.*, a freeman of *London*, *B.*, the father, settles a term for years in trust, that *A.*, the husband shall receive the rents and profits till such time as *D.* and *E.*, or the survivor of them should otherwise appoint, and then such persons as they should appoint; and for want of such appointment, for such persons as the said *A.* by will should appoint; and for want of such appointment, then in trust for the executors and administrators of *A.* The trustees having made no appointment, the question was, Whether this term should go according to that appointment, or be looked on as part of *A.*'s personal estate, who was a freeman of *London*, and so go according to the custom? and the court was of opinion, that it was not to be looked upon as part of *A.*'s personal estate, because it was never in him, but was settled by his wife's father, and therefore not subject to the custom.

Chan. Ca.
310. per
Lord Chan-
celor.

If a freeman of *London* is made both executor and residuary legatee, and he dies before he has made his election, whether he will take as executor or legatee, yet the legacy must be considered as such, and will be subject to the custom of *London*.

Lev. 227.

2 Vern. 277.

Chan. Ca.

199.

(a) It is said
that this
custom of

By this custom a freeman could (a) not by will dispose of such part of his personal estate as belonged to his wife or children; and (b) even dispositions by him in his life-time have been holden void, especially, when they appeared to have been made in fraud of the custom, and with a view to defeat it.

the city of *London*, that a man could not give away any part of his estate without the consent of his children, is the remains of the old common law, and is so taken notice of in *Brañon*; but it being found extremely inconvenient and hard, it was by the tacit consent of the whole nation abrogated and grown into disuse; for what law has ever been made to repeal it? but in the city of *London*, where the mayor and aldermen had the care of orphans, they by that sole authority and power had preserved this part of the common law in *London*, which is disused every where else. Preced. Chan. 596. (b) But for this vide 2 Lev. 130. 2 Vern. 58. 202. 612. 685. Lev. 227. Preced. Chan. 17. 50. Abr. Eq. 152.

[(b) If there
were issue of
the first
marriage
living at the
time of the
second, the
death of
such issue
afterwards
will not pre-
vent the
custom from
attaching,
and bar the widow from claiming under it. *Danſen v. Hawes*, Ambler 276.]

But now by the 11 *Geo. 1. cap. 18. § 17.* it is enacted, "That it shall and may be lawful to and for all and every person and persons, who shall, at any time from and after the first day of *June* 1725, be made or become free of *London*, and also to and for all and every person and persons, who are already free of the said city, and on the said first day of *June* 1725 shall be unmarried, and not have issue by any former marriage, (c) to give, devise, will, and dispose of his and their personal estate and estates, to such person and persons, and to such use and uses, as he or they shall think fit.

Provided nevertheless, "That in case any person, who shall, at any time or times from and after the said first day of *June* 1725, become free of the said city, and any person or persons who are already free of the said city, and on the said first day of *June* 1725, shall be unmarried, and not have issue by any former marriage, hath agreed, or shall agree by any writing under his hand, upon or in consideration of his marriage, or otherwise, that his personal estate shall be subject to, or to

“ be distributed, or distributable, according to the custom of the
 “ city of *London*; or in case any person so free, or becoming free
 “ as aforesaid, shall die intestate, in every such case the personal
 “ estate of such person so making such agreement, or so dying
 “ intestate, shall be subject to, and be distributed and distri-
 “ butable according to the custom of the said city; any thing
 “ herein contained to the contrary in any wise notwithstanding.”

[*A.* being about to marry an orphan of the city of *London*, agreed with the court of aldermen, in consideration of the marriage, and of their giving their consent thereto, to take up his freedom within a certain time, which time he survived, but died without performing his agreement. It was decreed, that he was in equity to be taken as a freeman, and therefore his personal estate was to be distributed according to the custom, notwithstanding he had by will made a different disposition of it. It was said by the chancellor, that the agreement being entered among the orders and proceedings of the court of aldermen, and that court being a court of record, it became matter of record.

Frederick v.
 Frederick,
 1 P. Wms.
 710.
 4 Br. P. C.
 7. S. C.

If a freeman disposes of his property in such manner as not to take place till after his death, it is a fraud upon the custom, and the property shall be subject to it.

Smith v.
 Fellows,
 2 Atk. 62.
 377.
 Coomes v.
 Elling,
 3 Atk. 676.

So, if, several years before his death, he purchases a leasehold estate for 40 years, in the joint names of himself and wife, it is a fraud upon the custom, and the estate shall be applied as the rest of his property.

A freeman of very advanced age, ill of the gout, two days before his death, by deed of the same date with his will, assigned part of his personal estate in trust for the separate use of his daughter, and directed that she should not have power to give it to her husband. She had married without consent, but the father had been reconciled to her and her husband. The deed was not delivered to the daughter. Lord *Hardwicke* held it to be a testamentary disposition in fraud of the custom, and that it was competent to the husband to dispute it; but he would not allow him to take the wife's customary part, without making a settlement upon her.]

Tomkins v.
 Ladbroke,
 2 Vez. 591.

2. Of the Children's Part; and herein of Survivorship, Advancement, and bringing into Hotchpot.

It has been already observed, that the children of a freeman of *London* are entitled to the third part of his personal estate, in case he dies leaving a wife, and to a moiety in case he dies leaving no wife, but (a) this custom does not extend to grand children; and, therefore, if a freeman of *London* has two sons, and the eldest dies, leaving a son, the grandchild, though in law a representative of the son, shall have no part by the custom.

(a) 2 Salk.
 426.
 Vern. 397.
 S. P.

But a posthumous child shall come in with the rest of the children for a customary share of a freeman of *London*'s personal estate.

Abr. Eq.
 154.

(a) 2 Salk.
426.

Preced.

Chan. 207.

So certified

by the re-

corider. Pre-

ced. Chan.

537. S. P.

— 2 Vern. 559.

S. P.

See 3 Will. Rep. 318.

in a note S. C. cited.

Although he devises

it away at the age of 17.

(b) But if a man marries an orphan, who dies under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. Vern. 88. But *vide*

Preced. Chan. 537. *cont.* — [If a man marries an orphan, and dies; his representatives are not entitled to any part of what was his wife's customary share, but the whole belongs to the wife. Vin. Abr. tit. *Customs of London*, (B. 10.) 18.]

But if a freeman of *London* dies, leaving two daughters and a

wife, and one of the daughters dies before twenty-one, though

after a division and partition of the personal estate, yet the sur-

viving sister shall have the whole of the orphanage part.

Rep. 32.

Preced. Chan. 370. 372.

Preced.

Chan. 537.

But this custom of survivorship holds only with respect to the

orphanage part belonging to such child; and therefore if he by

survivorship hath the part of any other brother or sister, such

part shall go according to the statute of distributions.

If the daughter of a citizen of *London* marries in his life-time,

against his consent, unless the father be reconciled to her before

his death, she shall not have her orphanage share of his personal

estate; and it would be unreasonable to take the custom to be

otherwise.

Vern. 354.

Said by Lord

Chancellor.

Yet in Hill

v. Blacket,

Cases emp.

Finch. 248.,

it is said, the

recorder certified that there was no such custom.

By the laws and customs of the city of *London*, if any free-

man's child, male or female, be married in the life-time of his

or her father, by his consent, and not fully advanced to his or

her full part or portion of his or her father's personal or custom-

ary estate, as he shall be worth at the time of his decease, then

every such freeman's child, so married as aforesaid, shall be ex-

cluded and debarred from having any further part or portion of

his or their said father's personal or customary estate, to be had

at the time of his decease, except such father, by his last will and

testament, or some (c) other writing by him written, and signed

with his name or mark, shall declare and express the value of such

advancement (d); and then every such child, after the decease of

his or her said father, producing such will or other writing, and

bringing such portion so had of his or her father, or the value

thereof into hotchpot, shall have as much as will make up the

same a full child's part or portion of the customary estate his or

her said father had at the time of his decease, notwithstanding

such father shall, by any writing under his hand and seal, declare

that such child was by him fully advanced (e).

Green's Privil. of Lond. 53. In *Dean v. Delcar*, cited in 1 P. Wms. 642. it is said to be suf-

ficient; though written by the father's book-keeper, or servant. But the reporter adds a *quare*. (d) The

ground of requiring the value of the advancement to appear in this manner, is, partly by reason of the dif-

ficulty of taking an account after such a length of time, but principally because it cannot be known, what

is to be brought into hotchpot; and if it does not appear what the sum was, the other children may be wronged.

1 P. Wms. 642. 1 P. Wms. 16. (e) Where the husband and his wife, who was a city orphan, in confi-

deration

deration of 100 *l.* executed a release of their customary share to the father, it was holden, that they were barred from demanding any further share, and that this release was no writing under the father's hand signifying the advancement. Preced. Chan. 594.—[So, where the daughter only, being of full age, had, upon her marriage, for a valuable consideration, released her customary share. Lockyer v. Savage, 2 Str. 947.—So, if the wife be under age, and the husband and she, in consideration of a marriage portion, covenant to release her orphanage share, the husband's covenant is considered in equity, on a bill against the husband and wife for a specific performance of the articles, as an absolute release, and will extinguish the wife's right. By an old law in the city, called Jud's law, a husband is authorized to agree with the wife's father, though she be under age. Medcalf v. Medcalf, 2 Atk. 63. But the release extorted by a father from his son, merely for the sake of maintenance, and not for his advancement in marriage or trade, is absolutely void, as a fraud upon the custom. Heron v. Heron, 2 Atk. 160. So, if a father who has children, some of age, some under age, take a release from those who are of age, the release is void, for if the infants do not consent when they come of age, they may engross the whole orphanage part in exclusion of the rest. Morris v. Boroughs, 1 Atk. 399. Where a daughter accepts a legacy of 10,000 *l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does accordingly; if the orphanage part be much more than her legacy, though she was told the might elect which she pleased, yet, if she did not know she had a right, first to inquire into the value of the personal estate, and the *quantum* of the orphanage part before she made her election, this is so material that it may avoid her release. Pusey v. Desbouvrie, 3 P. Wms. 316.

A freeman of *London* having advanced his daughter with a portion, and intending to exclude her from any farther share (on some displeasure taken against her) made his will, and thereby recites, that he had advanced her with 300 *l.* and (a) upwards, gives her 5 *s.* and no more, and died; yet after his death, the daughter on a bill brought to have the said 300 *l.* made up a moiety of his estate (he having no other child, and the custom not extending to grandchildren) had a decree accordingly; for the words, *and upwards*, are *certum in incerto*, and not to be regarded, though it was objected it might be 1000 *l.* or 2000 *l.* or any other sum above 300 *l.*

deemed fully advanced. Cleaver v. Spurling, 2 P. Wms. 527. Fawcner v. Watts, 1 Atk. 426. Elliot v. Collier, 3 Atk. 526. 1 Vez. 15. S. C. 1 Will. 168. S. C. And advancement in marriage with a first husband who died in the father's life time, is a bar to a second husband. 1 Atk. 406.] (a) Where the father by his will declared that he had given 1000 *l.* to one of his children, 1000 *l.* to another, &c. in full of their orphanage part by the custom, such declaration is sufficient to let them into their full customary shares, on bringing these sums into hotchpot; but it seems that the parties concerned are not so far concluded by this declaration, but may give in evidence that more was received by the children than thus expressed. Preced. Chan. 470. 471.—[Parol evidence of the father's declarations with respect to the advancement, can in no case be received: but declarations of the husband, or of the wife during the coverture of the first husband, are admissible. 1 Atk. 407.]

Abr. Eq. 155. Bright and Smith, decreed. [Where a child, tho' an only child, is advanced, and the *quantum* of the advancement does not appear, he shall be

A (b) settlement of a (c) real estate on a child, is no advancement, nor to be brought into hotchpot.

of the real estate to a child, does not bar such child of the customary share. 2 Vern. 753. [But where a freeman by will charged 1500 *l.* on his real estate for his daughter; and gave her a share of his personal estate; the court would not allow her to take the sum charged on the real estate, and also claim an orphanage, but put her to abide entirely by the will, or by the custom. Cowper v. Scot, 3 P. Wms. 119.]—(c) Or money agreed to be laid out in the purchase of lands. Vern. 345. 2 Chan. Ca. 118. Abr. Eq. 153.

Chan. Ca. 160. (b) A devise [But where a Freest and Feast.

If upon a marriage treaty A. a freeman of *London*, covenants to leave his wife 2000 *l.* at his death, 2000 *l.* to his eldest son, and 1000 *l.* a-piece to his younger children, and dies, leaving several younger children; the 1000 *l.* a-piece to the younger children being due only by covenant, is a debt on the personal estate, and not being to be paid till after the father's death, is no provision or advancement within the custom of *London*, to bar them of their customary or distributory shares.

Abr. Eq. 250. Feast and Feast.

Car v. Car,
2 Atk. 277. [If a freeman by will gives 200*l.* to his son, and in his life pays him 200*l.*, and takes a receipt in full for what was intended him by the will, this shall be considered as an advancement, and brought into hotchpot.

Weyland v. Weyland,
2 Atk. 632. Where a father, upon the marriage of his son, settled 5000*l.* S. S. annuities upon himself for life, remainder to his wife for life, remainder to his son for life, remainder to his son's wife for life, remainder to the issue of the marriage; it was holden, that the son, to entitle himself to a share of the father's personal estate, must bring the whole 5000*l.* and not the value of his estate in it for life only, into hotchpot.

Cowper v. Scot, 3 P. Wms. 119. If a man makes an executor in trust, and devises his personal estate among his seven children, and four of them are advanced by him in his life-time, and one of them dies before the testator; the children advanced shall have their share of this seventh part, without bringing what they have received into hotchpot.]

Vern. 345. If a freeman of London advances a child in part, by a portion which is to be brought into hotchpot, such portion or advancement must be brought into the orphanage part only.

2 *Vern.* 281.
2 *Solk.* 426.
S. P. And therefore if there be but one child, who has been in part advanced by the father in his life-time, such child shall not bring his part into hotchpot, there being none in equal degree with him.

2 *Vern.* 234.
630. and brought in, it must fall again into the child's part. [2 P. Wms. 526. Ambl. 189. S. P. See *City v. City*, 2 Lev. 130. *f. mb. contr.* But see also Lord Hardwicke's remark on that case in 2 Vez. 595.]

Morris v. Burroughs,
1 Atk. 399. [Sums of money, however small, if given as advancement, must be brought into hotchpot; but trivial sums given as presents shall not.

Hender v. Rose, 3 P. Wms. 317. So, small sums given occasionally, or maintenance-money or allowance, at the university or for travelling, shall not be deemed part of a child's advancement, nor shall money given with him as apprentice.

Elliot v. Collier,
3 Atk. 526.
1 Vez. 15. A gold watch, or wedding clothes, are no advancement, nor a gift of 50*l.* in money, where the orphanage share is considerable. Neither is consent to a daughter's marriage any bar to her, where the *quantum* does not appear under the father's hand.

Hume v. Edwards,
3 Atk. 430. Where a freeman had two daughter's, *A.* and *B.*, and on *A.*'s marriage gave 2000*l.* and a bond for 2000*l.* more at his death, and afterwards gave her 428*l.* to buy a house, which was done; and *B.* married without his consent, but he was afterwards reconciled to her, often stayed weeks with her, and gave her presents from time to time to about 500*l.* but no advancement; it was decreed, that *A.*'s 2000*l.* and 2000*l.* should be brought into hotchpot, but not her 428*l.* nor *B.*'s 500*l.*

Norton v. Norton, 3 P. Wms. 317. If a father buy an office, though but at will, or a commission, it is an advancement.

Hearne v. Barber,
3 Atk. 219.
In this case So, if, some years after the marriage of a freeman's son, the parents on both sides meet, and agree to advance 200*l.* a-piece to lie by till they can purchase a commission in the army for him,

him, this is an advancement, and bars him of his orphanage share.] it was said, that Judd's law which was an act of common council in the time of Henry the 6th, does not make it a bar unless it was an advancement upon marriage.

3. Of the Wife's Part, and what shall bar her thereof.

The widow of a freeman of *London*, by the custom, is entitled to her widow's chamber, and to a moiety of his personal estate if he leaves no children, and to a third part in case he leaves any child or children. Hetl. 155. Vern. 132. Abr. Eq. 155.

But if a woman, upon her marriage, accepts a settlement out of the (a) freeman's personal estate, (b) such compounding, as it is called, shall (c) bar her customary share. Preced. Chan. 325, 326, &c. Abr. Eq. 157. (a) Although the composition or sum to be paid her was part of her own fortune. Preced. Chan. 327. (b) Though no notice was taken of the custom. Abr. Eq. 150. (c) Where she shall take by the custom, and likewise by her husband's will. 2 Vern. 110. But vide Preced. Chan. 353.

But though such composition shall bar the wife of her customary share, yet she is not thereby precluded from demanding the benefit of any gift or devise the husband may think fit to make her. Abr. Eq. 157.

Also, if a freeman, whose wife has been thus compounded with, dies intestate, his widow shall have such part of the legatory, or dead man's share, as she is entitled to under the statute of distributions, especially, if there were no express words in the agreement to exclude her. Preced. Chan. 327.

If a freeman of *London* makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate. Abr. Eq. 158, 149. decreed in Chancery between Atkins and Waterfon.

[But if a freeman, before marriage, settles some part of his personal estate upon his intended wife, to take effect after his death, this will bar her of her customary part, though no mention be made of the custom. Lewin v. Lewin, 3 P. Wms. 15.

If a wife be divorced *a mensâ et thoro* for adultery, she forfeits her right to her moiety and widow's chamber under the custom.] Pettifer v. James, Bunb. 16.

4. Of the Legatory, or dead Man's Share.

The legatory or dead man's share is the third part of a freeman's personal estate, in case he has a wife and (d) children, which the freeman might always have disposed of by will, and which for want of such disposition is under the direction of the statute of distributions, and not at all under the control of the custom of *London*. 2 Salk. 426. Vern. 6. 2 Vern. 559. Skin. 41. pl. 11. Preced. Chan. 409. (d) But

where there are no children the custom of *London* gives no directions, therefore the personal estate must be wholly governed by the statute of distributions. But the custom of the province of *York* extends to give such moiety to the next of kin to the intestate. Preced. Chan. 327. 328. But note, that the custom of the city of *London* in the distribution of an intestate's estate, shall prevail against the custom of *York*. 2 Vern. 28. — As if a freeman of *London* dies in *York*, his heir shall come in for a share of the personal estate, though by the custom of *York* he is debarred thereof, for the custom of *London*, which follows the person, shall be preferred to that of *York*, which is only local. 2 Vern. 82.

Abr. Eq. 160. *& vide* 2 Vern. 111. 754. S. P. (a) Where it was holden, that 100 l. devised for mourning should come out of the testamentary, and not out of the whole personal estate. 2 Vern. 420.

If a freeman of *London* makes his will, and devises legacies to his children more than their orphanage part would amount unto, without taking any notice whatsoever of the custom; these legacies shall be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt, and the legacies shall not come (a) out of the testamentary or dead man's part, for it would be unreasonable that they should take both by the will and the custom.

Abr. Eq. 160. *per* Lord Chancellor; but in this case he sent it to the recorder to certify the custom.

But if such legacies are less than their orphanage shares, they shall not *pro tanto* be a satisfaction, but in such case the legatees shall take both, especially if none of the devises in the will are thereby disappointed.

Wilson v. Phillips, Bunb. 195.

[So, if he devise no more than his testamentary part, the children shall have both their legacies, and their customary shares; but if he devise his whole estate, they must make their election.]

Morris v. Burroughs, 2 Atk. 627.

If a freeman devise all his estate, orphanage and testamentary, and some of the children abide by the custom, others by the will, the shares of the latter shall not go among the others, but shall accrue to the testator's estate, and go according to the will.

Harvey v. Desbouverie, Ca. temp. Talb. 130. See also **Hanbury v. Lord Bateman,** 2 Atk. 63.

Although neither the father, nor the orphan, can devise either the orphanage part or contingency of the benefit of survivorship, or the part which accrued by survivorship; yet if the father make a disposition by his will inconsistent with the custom, the children must make their election to abide by the will or the custom; for they cannot abide by the will in part, and have the benefit of the custom also.]

Preced. Chan. 409. decreed between Read and Duck, although it was certified that there was no custom in London which directed how such loss should be borne. [2 Ld. Raym. 1528. S. C. by the name of **Redshaw v. Brasier.**] Vin. Abr. tit. *Customs of London.* (B. 9.) pl. 4. S. C. [But the funeral expences of a child dying after his father, shall be paid out of the orphanage share. 3 Atk. 676. And if a father maintains his daughter after her husband's death, his executor shall be considered as a creditor for so much as the maintenance amounted to, which shall be deducted out of the daughter's customary share. 3 Atk. 526. 1 Vez. 15.]

1 Atk. 64. [Where the wife's right to the orphanage part is extinguished by the release of the husband, the estate is left as if it had never been charged with it, and it is considered as part of the testator's general personal estate, and does not go wholly to the executor of the father, as part of the dead man's share.]

(D) Of the Custom of *London* as it relates to Feme Coverts.

BY the custom of *London*, if a feme covert, the wife of a free-man, (a) trades by herself in a trade, with which her husband does not (b) intermeddle, she may (c) sue and be sued as a feme sole, and the husband shall be named only for conformity; and if judgment be given against them she only shall be taken in execution.

not be in a shop. Show. Rep. 184. (b) But if the wife uses the same trade that her husband does, she is not within the custom. Mod. 26. (c) But it must be in the courts of the city. Moor 135, 136. Cro. Eliz. 409. [4 Term Rep. 361. S. P.]

Cro. Car. 69.
Hettl. 9.
Lit. Rep.
31. S. C.
Leon. 131.
2 Brownl.
218. S. P.
(a) Need

If the wife of a freeman, who is a sole trader, contracts a debt and dies, and afterwards the husband promises to pay it, yet such promise is not sufficient to maintain an *assumpsit* against the husband, for as he was not originally liable, the subsequent promise without any consideration.

Show. Rep.
183. Fabian
v. Plant.

A recovery suffered by baron and feme of the lands of the feme shall as effectually bind the right of the feme by the custom of *London*, as a fine at common law.

Roll. Abr.
556.

(E) Of the Custom of *London*, with respect to Masters and Apprentices.

AN infant unmarried, and above the age of 14, may (d) bind himself apprentice to a freeman of *London* by indenture with proper covenants, which covenants by the custom of *London* shall be as (e) binding as if he were of full age.

Mod. Rep. 271. pl. 22. 2 Keb. Rep. 687. pl. 14. 2 Vern. 472. pl. 445. (d) Custom of London to put over an apprentice to another, is good. March 3. (e) And for a breach an action may be brought in any other court as well as in the courts in the city. Moor 136.

Moor, 135.
pl. 28.
2 Bull. 192.
2 Roll.
Rep. 305.
Palm. 361.

If the indentures be not enrolled before the chamberlain within the year, upon a petition to the mayor and aldermen, &c. a *scire facias* shall issue to the master to shew cause why not enrolled; and if it was through the master's default, the apprentice may sue out his indentures; otherwise, if through the fault of the apprentice, as if he would not come to present himself before the chamberlain, &c. for it cannot be enrolled unless the infant is in court and acknowledges it.

2 Roll.
Rep. 305.
Palm. 361.
& vide
Mod. 271.
Boh. Priv.
Lord. 175.
333.

This custom does not extend to one bound apprentice to a waterman under 21, for the company of watermen are but a voluntary society, and being free of that does not make one free of *London*.

6 Mod. 60.
12 Mod. 415.

(F) As it relates to Landlords and Tenants.

2 Sid. 20.

BY the custom of *London* a tenant at will under the yearly rent of 40*s.* shall not be turned out without a quarter's warning; and such tenant paying above 40*s.* yearly rent, shall not be turned out without half a year's warning.

Moor, pl.
827.
Palm. 212.

But a custom that tenant for years shall hold for half a year after his term ended, is not good.

(G) Of the Customs of *London*, which are in furtherance of Justice, and for the more speedy Recovery of Debts.

Hob. 86.
Vent. 29.
5 Mod. 93.
& *vide*

Roll. Abr. 555.

Cro. Eliz.

499.

Noy, 53.

Roll. Abr.

557.

Leon. 166.

Moor, 136.

S. P.

BY the custom of *London* a creditor may, before the day of payment, arrest his debtor, and oblige him to find sureties to pay the money on the day it shall become due.

If a contract be entered into by two citizens, and one of them, who is thereby obliged to pay a sum of money, die intestate, his administrator shall be obliged to pay it in the same manner as if it were a debt by obligation.

If *A.* and *B.* are bound as sureties for and with *C.* to *D.*, and *D.* recovers against *A.* in *London*, and has execution against him, *A.* may there sue *B.* for contribution *ut uterque eorum oneretur pro rata* according to the custom of *London*, and therefore where such action was removed in *B. R.* by writ of privilege, the same was remanded, because otherwise the plaintiff would be without remedy, for by the course of the common law no action lies.

(H) Of the Custom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.

(a) Roll.
Abr. 551.
(b) Carth.
25.

(c) For the
year and day
disfranchiare
debitum,

vide Cro.

Eliz. 713.

Leon. 52.

BY the (a) custom of *London*, if *A.* is indebted to *B.*, and *C.* is indebted to *A.*, *B.* upon entering a plaint against *A.*, may attach the debt due from *C.* (who is called the garnishee) to *A.*, and this (b) custom of foreign attachment is to no other purpose but to compel an appearance of the defendant in the action; for if he appear within (c) a year and a day, and put in bail to the action, the garnishee is discharged.

Roll. Rep. 106. Roll. Abr. 551.

Roll. Abr.

551.

Cro. Eliz.

558, 830.

The garnishee may plead this custom of foreign attachment to an action brought against him by his creditor, but then the plain-
tiff

tiff may traverse the cause thereof, and that he was not indebted to him who attached it.

Such goods cannot be attached, of which the party had no property at the time of the attachment. 17 E. 4. 7. b.
Roll. Abr.
551. S. C.

So, if *A.* be indebted to *B.*, and *J. S.* a stranger, takes by tort certain goods of *A.* as a trespasser, *B.* cannot by the custom attach these goods in the hands of *J. S.* for the debt of *A.*, because the property is out of *A.* at the time, and he had only a right in him.

A legacy cannot be attached in the hands of an executor by foreign attachment; because it is uncertain whether, after debts paid, the executor may have assets to discharge it. Roll. Abr.
551. Noy,
115. S. P.

If *A.* be indebted to *B.* by obligation, and *B.* be indebted by contract to *H.*, and *B.* die, and his administrator demand the debt upon the obligation of *A.*, who promises him that, if he will forbear him for a month, he will pay him then, but he does not pay him accordingly, and after *H.* bring debt in *London* against the administrator upon the contract (as he may there by the custom) the debt of *A.* due by the obligation may be attached in the hands of the administrator; for notwithstanding the promise broken, yet the debt continued due by the obligation, and a recovery upon the obligation will be a bar of the action upon the promise, in which all should be recovered in damages. Roll. Abr.
551. Spink
and Tenant,
Roll. Rep.
106. S. C.

If *A.* lends *B.* 100*l.* to be repaid him upon the death of his father, and after the death of the father of *B.* this 100*l.* is attached by force of a foreign attachment, and after *A.* brings an action upon the case against *B.* for this money, this foreign attachment will be a good bar thereof, though the custom be to attach debts, and this is an action upon the case, in which damages only are to be given, because this is a debt, and he might have an action of debt thereupon; and therefore, inasmuch as this is well attached, he shall not defeat it by bringing an action upon the case. Roll. Abr.
552. Hals
and Walker,
adjudged
upon a foreign attachment in
Exeter,
where the
custom is
the same as
in London.

If *A.* sells certain stockings to *B.* upon a contract, for which *B.* is to give 10*l.* to *A.*, and if he sells the stockings again before *August*, after that he shall give twopence more for every pair of the stockings, the 10*l.* is attachable by foreign attachment, because an action of debt lies for it, but the twopence for every pair of stockings is not attachable, because this rests only in damages, to be recovered by an action upon the case, and not by action of debt, because it is made payable upon a possibility. Roll. Abr.
552. Read
and Hawkins.

If there are several accounts, &c. between *A.* and *B.*, and *A.* dies, and his executor and *B.* submit to the award of *J. S.*, and he awards that the executor shall deliver certain goods, of which *A.* died possessed, to *B.*, and that *B.* shall pay the executor 300*l.* this money cannot be attached in the hands of *B.* for the debt of *A.*; for upon the matter the executor being liable to *devastavit*, ought to have remedy in his own right for the sum awarded. Vent. 112.
Horslam
and Targett,
Lev. 395.
S. C.

If *A.* is indebted to *B.*, who is indebted to *C.*, and *B.* assigns the debt of *A.* to *C.* in satisfaction of his debt; now the debt due 2 Jon. 222.
Lewis and
Wallis.

from *A.* is become the right and property of *C.*, and *B.* hath nothing but in trust for *C.*, and therefore it ought not to be attached for any debt of *B.*, and upon the special matter shewn the lord mayor ought to give relief.

Roll. Abr.

553.
(a) But if the value of the tobacco had been averred in the record of the attachment, the debt might have been well attached in this action. Roll. Abr. 554. & vide Jon. 406.

In an action of debt for tobacco, in the detinet, a debt cannot be attached within the custom, in satisfaction thereof, because it does not (a) appear of what value this tobacco was, so that it might appear that the debt is but a satisfaction to the value, which cannot be supplied by a plea in bar made in another action against him, in whose hands the debt was attached.

Roll. Abr.

552.
4 Leon. 740.
Cro. Eliz.
63. Leon.
29, 264.
(b) After issue joined

A debt due by specialty may be attached by the custom of London, because the attachment may be pleaded if an action be brought for it in the courts at *Westminster*, but a debt (b) recovered in any court in *Westminster* by (c) a judgment cannot be attached by the custom of London, because the party has then no time to plead it.

in an action of debt in *B. R.* the debt for which the action was brought cannot be attached in London, for the inferior court cannot attach a debt in a superior court. Roll. Abr. 552.—So, after imparlance to an action of debt in *B. R.* Roll. Abr. 552. Cro. Eliz. 157. 3 Leon. 232.—So, if a writ returnable in *B.* be purchased before the attachment. Cro. Eliz. 101. 593. 691. 3 Leon. 210. Roll. Abr. 552. [So, a sum of money directed to be paid by *A.* to *B.*, by the master's *allocatur*, cannot be attached in *A.*'s hands. Coppel v. Smith, 4 Term Rep. 312. So, a sum of money awarded under a rule of court cannot be attached. Grant v. Hawding, E. 7 G. 3. *B. R. ibid.*] (c) So, if levied upon a *fieri facias*, and in the sheriff's hands. 1 Leon. 30. 264.—So, if a suit be begun in equity, the effect thereof shall not be prevented by a foreign attachment. 2 Chan. Ca. 233.

Cro. Eliz.

593.
Lewknor and Huntly, 712, 713. S. C. resolved also upon a writ of error, though the judgment was reversed for another reason.

If *A.* is indebted to *B.*, and *C.* is indebted to *A.*, and *B.* brings debt in *B. R.* against *A.* pending this action, *B.* may affirm a plaint in London against *A.* for the same debt, &c. and attach the debt in the hands of *C.*; for though a debt in London, for which there is a suit depending in *B. R.* cannot be attached, yet he that hath brought an action in *B. R.*, may, notwithstanding according to custom, attach the debt of the party, for the debt in question in *B. R.* is not touched by this attachment.

Carth. 344.

Masters and Lewis. 1d.
Raym. 56.
Skin 516.
Pl. 6.
5 Mod. 75.
92, S. C.
2 Jon. 165,
201. & vide Roll. Abr. 551, 906.
Cro. Eliz. 410, 598.
Noy, 53.
Dyer, 247.
3 Wils. 297.

A. is indebted to *B.*, and *C.* is indebted to *A.* by simple contract; *A.* dies intestate, and *B.* enters a caveat against his widow's taking out administration; pending which, he enters a plaint in the sheriff's court of London against the archbishop of Canterbury, and thereupon attaches the debt due from *C.*, after which the widow has administration granted to her, who brings an action against *C.*, who insisted on the matter *supra*; it was holden, that this pretended custom, in this case, was unreasonable and void, because the archbishop had no right to the debt, nor any means to recover it; besides, hereby every creditor would be his own carver, and the goods of the intestate wasted without any remedy.

2. In whose Hands, and at what Time, the Attachment may be made.

If *A.* recovers a debt against *B.* in *London*, *B.* may attach this debt in his (*a*) own hands for so much due to him. Roll. Abr. 554. Cro. Eliz. 186.

(*a*) Whether a debt owing to a company is attachable, for the debt of the company. Mod. 212. *dubitatur*.

By this custom a debt contracted without the jurisdiction of the city may be attached, if the debtor is found within the jurisdiction, for every debt follows the person of the debtor. Carth. 25, 26. Vent. 236. & vide Roll. Abr. 554.

An obligee before the debt is due by obligation cannot by the custom attach a debt for it, because he cannot affirm a plaint for the first debt before it is due. Roll. Abr. 553. 3 Leon. 236. S. C.

But if *B.* is indebted to *A.*, and *C.* is bound to *B.*, but the day of payment is not yet come, *A.* may attach this debt in the hands of *C.* (*b*) before it is due to *B.* Roll. Abr. 553. 3 Leon. 236. & vide

Cro. Eliz. 184. Roll. Rep. 105. Cro. Eliz. 713. Noy 68. (*b*) But the custom so to do must be specially alleged. Roll. Abr. 553. Noy 68.—And the judgment shall be, that he shall be paid when it becomes due. Roll. Abr. 533. Sid. 327.

So, if *A.* lends money to *B.* to be repaid upon the death of the father of *B.*, and after, an action is brought by *C.* against *A.* and after, the father of *B.* dies, the money due by *B.* to *A.* may after be attached in the hands of *B.*, though it was not due at the time the plaint commenced against *A.*, inasmuch as it became due before the time that by custom the process is to be granted against him in whose hands it is attached. Roll. Abr. 553.

If in debt upon an obligation of 100*l.* conditioned for the payment of 50*l.* at a day, the defendant pleads, that before the day of payment of the 50*l.* it was attached in his hands by a creditor of the plaintiff, &c. and that after the day upon a *scire facias* against him according to custom he paid it; this is a good bar of the (*c*) whole, because the attachment being made before the day of payment, it became a debt to the creditor, and the obligee could take no advantage of a breach of the condition afterwards. Sid. 327. Robbins and Standard. (c) If the attachment had been of 20*l.* only, it might have been pleaded in bar of so much. Sid. 327. & vide Godb. 196. Owen, 2. Moor, 598.

3. Of the Form of the Proceedings in a Foreign Attachment.

By this custom the plaintiff must swear that the debt is *bona fide* due to him; but it is not sufficient to allege that he swore that the debt was a true one by himself, or his attorney; for the attorney's swearing is not according to the custom. Roll. Abr. 554. Cro. Eliz. 23. Jon. 406.

If *A.* affirms a plaint against *B.* and upon *nihil* returned, it is surmised that *C.* hath money in his hands due to *B.* &c. and the money is attached in the hands of *C.*, who appears upon the attachment, and pleads that he owes nothing to *B.*, though this be found against *C.*, and thereupon there is judgment against him, yet he shall not pay any costs, for there are no costs recoverable in a foreign attachment. Cro. Eliz. 172. Leon. 324.

Roll. Abr.
555. [But
the defend-
ant must be
summoned,
or have no-
tice, though
it hath been
alleged, that
the custom

in the city-court is to give no notice,) else the judgment against the garnishee will be erroneous, and the money paid or levied in execution of it will not discharge the debt from the garnishee to the defendant. *Fisher v. Lane*, 3 Wils. 297.]

Roll. Abr.
555.
22 H. 6. 47.
(a) Godb.
401.
Litch. 228.
(b) A cus-
tom for a
foreign at-
tachment
before some
default in
the defend-
ant is
naught.
Vent. 236.
(c) Moor,
570. pl.
779. like
point.

Carth. 282.
Lawrence
and Ather-
ton, ad-
judged.
[Foreign
attachment
may be given
in evidence
on the ori-
ginal issue.]
Carth. 25.

By this custom, if *A.* sues *B.* in *London*, &c. and *C.* is in-
debted to *B.* in the same sum, and *C.* is condemned there to *A.*
according to the custom, and judgment given against him accord-
ingly, yet, if no execution be sued against *C.*, *A.* may resort to
have judgment and execution against *B.* his principal debtor,
and *B.* may sue *C.* for his debt, notwithstanding the unexecuted
judgment.

In bar of an action brought in *B. R.* if the defendant pleads a
judgment in a foreign attachment in bar, and alleges the custom
to be, that if the plaintiff in the court hath process against the
defendant, and upon a *nihil* (a) returned makes a furnise that *B.*
is indebted in so much to the defendant, and upon his prayer to
attach it in his hands by process, and he does it accordingly; and
if (b) the defendant makes default at four courts after, that by
the custom, at the last of the said four courts the plaintiff may
pray process against *B.* to come in and shew cause wherefore the
judgment should not be against him at the next court after, and
when he comes to apply this custom to his case, he shews that
there were four defaults, and that at the fourth default the plea
was continued for several courts, and then process went against
B., and then after judgment against him, (c) this is not warrant-
able by the custom, inasmuch as he shews by the custom, it ought
to be at the next court after the four defaults.

If in debt the defendant pleads that *J. S.* entered a plaint,
&c. against the plaintiff in *London*, and upon process against
him *non est inventus* was returned, and thereupon a suggestion was
made that he had so much money in the hands of the defendant,
and that the defendant was attached by the said money; this
is an ill plea, for it ought to have been that the plaintiff was at-
tached by so much money in the defendant's hands; for so is the
custom.

After a *dilatur* entered by the garnishee in the sheriff's court,
which is in nature of an imparlance, he cannot plead to the ju-
risdiction of the sheriff's court.

12 Mod. 213. It was ruled, That if *A.* brings debt in *London* against *B.*, and
attaches goods of *B.* in the hands of *C.*, from whose possession the
goods are not removed; and *B.* by certiorari brings the cause into *K. B.*
and put in bail, the attachment is at an end, and *C.* ought to de-
liver the goods to *B.*, which if he do not, *B.* may have *trover* or
replevin.

Damages.

DAMAGES are a compensation given by the jury for an injury or a wrong done the party (a) before the action brought.

party has been at in obtaining his right, such as the moderate fees of counsel, attornies, &c., are termed costs; and these are given by the court, and taxed by their officer. For the difference between damages and costs, *vide* Salk. 209. 6 Mod. 157. Gilb. Eq. Rep. 195. 199. Barnes 306. tit. *Costs*.

Co.Lit.257.
10 Co. 116.
(a) The exp-
pences the

(A) In what Actions the Party shall recover Damages.

(B) What Persons are entitled to, or shall recover Damages.

(C) Against whom Damages shall be recovered.

(D) Of assessing the Damages: And herein,

1. Of the *Quantum* of the Damages the Jury may give.
2. Whether they may give more than the Plaintiff has declared for.
3. Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received: And herein of assessing entire Damages.
4. Where to be assessed jointly or severally, where there are several Defendants.

(E) Where the Court may encrease or mitigate the Damages.

(F) Of the Manner of assessing and recovering Damages.

(A) In what Actions the Party shall recover Damages.

AT common law no damages were recovered in any real action; for the detention of the possession, &c. being the cause of damages, till the right to the land was determined, the party could not be said to suffer any wrong: also, the burden of the feudal duties lay upon the tenant in possession, and, consequently,

10 Co.
116. a.
2 Inst. 284.
Co.Lit.257.
19 H. 6. 27.
2 Roll.
Abr. 550.

11 Co. 57. he was to receive the mesne profits until some other made out a better right, who after recovery might have maintained an action of trespass.
 For recovering the mesne profits in ejectment, replevin, and trespass, *vide* the several heads; and where the courts of equity will oblige the tenant to account for the mesne profit, *tit. Account.*

8 Co. 50. a. But in an assize, which is (a) a mixed and compendious action, the disseisor not only recovered his possession, but also the mesne profits in damages.
 10 Co. 116. a. (a) But entry there were no damages; for such writ only demanded the freehold, and was not mixed with the personality. 2 Inst. 289. Booth 175. Nor in a writ of admeasurement of pasture. 2 Inst. 368.

For the exposition of this statute, *vide* 2 Inst. 287, 288.
 “By the statute of *Gloucester* made 6 E. 1., whereas before damages were not awarded in *Mortdancester*, unless upon a recovery against the chief lord, they shall be awarded in all cases where a man recovers in *Mortdancester*; so in coinage, aiel and befaiel;” and by the same statute, “every one shall render damages where the land is recovered against him, upon his intrusion or act.”

But for this *vide tit. Dower*, letter (I 146.)
 By the statute of *Merton*, cap. 1., Damages are given on the possessory action of dower, *unde nihil habet.*

Comp. Incumb. 292., &c.
 In a *quare impedit*, or *darrein presentment*, he for whom the judgment is given, shall recover as well his damages as his presentment and advowson.

(b) As all actions on the case or covenant, for which *vide title*
 In all actions *ex delicto*, which are either trespasses founded on force, or upon fraud, in the not performing of contracts, damages shall be recovered; and these are (b) such actions, as are said to found only in damages.

Covenant and Trever, for which *vide tit. Trever and Conversion*;—in account, *vide Poll. Abr.* 575. *Supra* Vol. 1. 40. In detinue the thing is to be recovered in specie, or damages for it. *Roll. Abr.* 574. In debt the same is to be restored *in numero*, but there are damages for the detainer, *vide Vaugh.* 101. damages shall be recovered in an *audita querela*. 26 E. 3. 73. In a writ of ward of the body and land damages shall be recovered, *Roll. Abr.* 575. But in writs of execution no damages shall be recovered, *Roll. Abr.* 575. 50 E. 3. 23., nor in a *jure factus*. 2 H. 6. 15.

But for this *vide title Prohibition*, and *vide*
 If, after a prohibition to the spiritual court, the party proceeds in such court, the plaintiff upon his declaration upon the prohibition, or upon an attachment, shall recover damages.
Roll. Abr. 575. *Jon.* 477. *Cro. Car.* 559. 2 *Jon.* 128. *Raym.* 387. *Vent.* 348. 350. 3 *Lev.* 360.

(B) What Persons are entitled to, or shall recover Damages.

15 H. 7. 4. b. 2 Inst. 285.
 IF lessee for years be ousted, and he in the reversion disseised, and he in the reversion recover in an assize, yet he shall not recover damages.

Roll. Abr. 569.
 So, if after the ouster he in the reversion enter upon the disseisor, (as he may by law, to save a descent), and after the disseisor enter upon him, and he recover in an assize, yet he shall not have any

any damages; for the re-entry of him in reversion reduces the estate to the lessee, and then the damages for the profits belong to him.

If tenant for life, and he in reversion join in a lease for life, Co. Lit. they may join in an action of waste; and tenant for life shall recover the place wasted, and he in reversion damages. 42. 4.

In debt by baron and feme, upon a bond made to the feme *dum sola*, they shall recover damages (a) jointly. Cro. Eliz. 259. (a) In an assise by

baron and feme, if it be found they were disseised, they shall recover damages of the issues in common, 11 H. 4. 16. b. Roll. Abr. 570. — In trespass by baron and feme, for imprisoning the feme till a fine * paid, for all the trespass, but the fine, they shall recover damages in common. Bro. Damages 51. Roll. Abr. 571. — * 2^o. As to the fine, that being to the particular and exclusive damage of the husband, if it is not the proper subject of an action at his suit alone?

So, in trover by baron and feme, executrix of A. for goods of A. they shall recover damages jointly; for the possession of the wife, as executrix, was also the possession of her husband, and the damages recovered shall be to the estate of the testator, and so may concern them both. Styl. 48.

If two jointtenants bring an assise, and the one is seised, if it be found that the other had goods taken upon the land, he shall recover sole damages for them †. 11 H. 4. 17. Roll. Abr. 571. † The owner of

the goods may maintain an action alone, for them.

(C) Against whom Damages shall be recovered.

BY the statute of *Gloucester*, made 6 E. 1. cap. 1. "Whereas (b) before damages were not awarded in assises of *novel disseisin*, (b) but only against the disseisors; it is provided, that if disseisors (c) alien the lands, (d) and have not whereof damages (c) may be levied, (e) they, to (f) whose hands such tenements shall come, shall be charged with (g) the damages (h), so that (i) every (k) one shall (l) answer (m) for his time, provided that the disseisee shall recover damages in a writ of entry, &c. (b) Owen, 112. Hob. 98. (c) So, if disseised, for, by equity, it extends to all that come under the disseisor by right or wrong. 2 Inst. 284. — So, if the lord distrains for rent, and a stranger rescues, though the stranger is only a disseisor in an assise against him and the tenant; if the stranger is found insufficient, the tenant shall answer in damages, though he claims not from the disseisor. 2 Inst. 284. (d) The tenant shall be charged only where the disseisor is insufficient; but if able to pay part, but not the whole, both shall be charged; therefore, the judgment is always given generally against both. 2 Inst. 284. (e) Lands held in *capite* were aliened to J. S., who died, his heir within age; and the king committed his custody to B., who took the profits, the heir was no tenant within the statute. 2 Inst. 284. *Secus*, if aliened to an infant, who took the profits, or if, coming in as heir, he had been out of ward. 2 Inst. 284. (f) Yet these general words shall not charge those with damages who have an estate cast upon them by law, unless they consent thereto, as the heir of the alienee, by refusing to take the profits, may discharge himself of the damages. 2 Inst. 284. So, if disseisor enfeoffs A. and B., and makes livery to A. only, and A. dies, if B. never assented, he may waive the possession, &c. Inst. 360. 2 Inst. 286. (g) And where by subsequent statutes double or treble damages are given in an assise, they shall be answered by every mean tenant accordingly, and for their insufficiency by the tenant. 2 Inst. 285. (h) In an assise, but not in a writ of entry, for that is to be brought against the tenant only, and this clause refers only to the assise. 2 Inst. 286, 287. (i) If named in the assise; otherwise, if the disseisor is found insufficient, the tenant shall be charged with the whole. 2 Inst. 285. But if found, that the disseisor is insufficient, and that he enfeoffed A. who enfeoffed B., who enfeoffed the tenant, and that A. had it one year, and B. another, and the tenant another, the tenant shall be charged for his own time only, and the plaintiff shall lose his damage against A. and B., because not named in the writ. 2 Inst. 285. (k) Tenant for years, or by statute, &c. is no mesne occupier within the act, unless the assise is brought by tenant by statute, &c. 2 Inst. 284. (l) If they have sufficient, otherwise the tenant must answer for the whole. 2 Inst. 285. (m) Yet several judgments shall not be given, but one judgment entirely against all, according

ing to the usage; but the sheriff upon the execution may use such indifferency as justices require. 2 Inst. 285. If the sheriff returns that the disseisor is insufficient, process shall issue to levy it of the tenant. 2 Inst. 285.

(a) This extends not to his heirs. 2 Inst. 186. “By the same act the (a) disseisee shall recover damages in a writ of entry (b) against (c) him that is found (d) tenant after the disseisor.”

But by a subsequent clause in this act, where he recovers the land against the disseisor, he shall have damage. (b) Extends not to him that has an estate by law cast upon him, if he waives the possession. 60. Lit. 360. 2 Inst. 286, 287. (c) If brought against two jointenants, and one disclaims, and the other takes upon him the whole tenancy, and pleads, &c, he shall answer the whole damages. 2 Inst. 287. (d) The disseisor enfeoffs A. who enfeoffs B., and in a writ of entry in the *per* and *cui* vouches A., who pleads and loses, judgment shall be given against the vouchee, because he is found tenant in law. 2 Inst. 287.

2 Inst. 289. In a writ of partition by one coparcener against the other, no damages shall be recovered, though the defendant hath not been Noy, 68. *vide* title *Coparceners*. at all times (e) ready to make partition.

(e) If a man will avoid the damages, because he hath been at all times ready to render the thing in demand, he ought to come at the first day. 17 E. 3. 71. In detinue against an executor, supposing it to come to his hands after the death of the testator, the defendant may come at the grand distress, and say, that he hath at all times been ready to deliver the writing after the time that it came to his hands, and thereby save damages against him. 22 Ed. 3. 9. Roll. Abr. 574.

(D) Of assessing the Damages: And herein,

1. Of the *Quantum* of the Damages the Jury may give.

vide Moor, 419. 3 Leon. 150. Owen, 34. Vent. 267. Where money laid out in repairs shall be recovered in damages. Godb. 53. Where in trespass for breaking his close, &c. the court refused to grant a new writ of inquiry, because the damages were too small, the suing forth the writ being the plaintiff's own act. 2 Leon. 214. But for this *vide* tit. *Trial*, and for what cause a new trial will be granted, *vide* Mod. 2. In trespass the jury gave the plaintiff half a farthing damages, and held good. 2 Roll. Rep. 21, 22., & *vide* 2 Jon. 138. [(f) But fraud vacates the policy, and therefore no such action would lie.]

Lev. 111. James and Morgan, Keb. 559. S. C. Thornborough v. Whitacre, 6 Mod. 305. The plaintiff declared upon an *assumpsit* to pay for an horse a barley-corn a nail, doubling every nail, and avers, that there were thirty-two nails in every shoe, which, doubling every nail, came to 500 quarters of barley; which being tried before Hyde, he directed the jury to give the value of the horse in damage, and accordingly they gave 8*l.* and held good. S. P. 2 Ld. Raym. 1164. S. C. 3 Salk. 97. S. C. 1 Wils. 295.

2. Whether they may give more than the Plaintiff has declared for.

In (a) personal actions, the plaintiff shall recover damages only for the *tort* done before the action * brought, and therein the plaintiff counts to his damage.

covers his damages pending the writ, and therefore never counts to his damage, 10 Co. 117. a. and though damages be given by statute, yet the old form remains. 2 Inst. 286. — In Foster and Bonner, B. R. E. 1776, the court, on argument, determined, that in an action, for carrying persons across the Thames, in prejudice to the Gravesend ferry, the plaintiff might give in evidence a *tort*, after suing forth the *latitat*, and before the day of exhibiting the bill, saying, in such case, the filing the bill was the commencement of the *fact*.

Also, in personal actions the plaintiff shall recover no more than he hath counted for, although the jury give him more, for he best knows the measure of his wrong, and what he is entitled to †.

Kelw. 21. Yelv. 45. Cro. Eliz. 544. Bull. 49. Fitz. Damages 16. S. C. Bro. 2. S. C. Cro. Jac. 297. S. C. — † If the jury give more, the plaintiff must relinquish the *extra* damages, for if he enters up the judgment for the whole, which the jury gave, it is error, and cannot be amended or helped, in any manner. So, determined in B. R. H. 1773, Sandiford and Bean, Esq.

If the tenant vouches, the demandant shall not recover more damages against the vouchee than he hath counted of; for the vouchee comes in lieu of the tenant, and the judgment is given against the tenant.

But the plaintiff in *detinue* may recover more damages against the garnishee than he hath counted of, for his count was not against the garnishee, but against the defendant, and damages against him are for the delay after the count.

In trespass for rescuing a distress, to his damage so much; if the defendant justifies the rescous upon special matter, upon which it is demurred for the plaintiff, he shall have damages as he hath counted of, (b) for the defendant hath acknowledged the trespass, and hath not denied the damages.

for not setting forth tithes, if the defendant pleads the 31 H. 8. c. 13. § 21., and that the lands were discharged in the hands of the prior of B. at the time of the dissolution, &c. and thereupon issue taken; and at the trial the defendant cannot make good his plea; the value shall be taken as confessed, because the issue is joined upon a collateral point; and the defendant took not the value by protestation. Allen 88. Rules upon a trial at bar, and a verdict given for 200 l. Vide Roll. Abr. 572.

Where the jury finds greater damages than the party declares of, the court may, to prevent error, give judgment for so much as the party declares for, *nullo habitu respectu* to the rest, else the party may release the (c) overplus, and take judgment for the rest.

in which the judgment is entered. Wray v. Lister, 2 Str. 1110. Chevely v. Morris, 2 Bl. Rep. 1300.]

Also, though the jury cannot regularly give the plaintiff more damages than he hath counted of, yet may they award him costs distinct and separate from the damages; and though such costs (d) exceed the damages laid in the declaration, yet shall the plaintiff recover both; for the damages are given for the wrong, for which

10 Co. 117. a. (a) But in a real action he recovers his damages pending the writ, and therefore never counts to his damage, 10 Co. 117. a. and though damages be given by statute, yet the old form remains. 2 Inst. 286. — In Foster and Bonner, B. R. E. 1776, the court, on argument, determined, that in an action, for carrying persons across the Thames, in prejudice to the Gravesend ferry, the plaintiff might give in evidence a *tort*, after suing forth the *latitat*, and before the day of exhibiting the bill, saying, in such case, the filing the bill was the commencement of the *fact*.

2 H. 6. 7. 8 H. 6. 5. 10 Co. 116. Owen, 45. S. P. per Cur.

8 H. 6. 11. Roll. Abr. 578.

8 H. 6. 5. 11. Bro. Damages, 68. S. C. Roll. Abr. 578. S. C. 21 E. 3. 40. b. Roll. Abr. 578. (6) In debt for 200 l. upon the 2 E. 6.,

Yelv. 45. [(c) But a remittitur cannot be entered in a term subsequent to that

For this vide 10 Co. 115. b. Cro. Eliz. 568. 2 Roll. Rep. 447. Cro. Jac. 95.

Yelv. 70. which the action is brought, and the costs for the charge of the
 Roll. Abr. 578. but sutt; the one before the sutt, and the other in and for the sutt.
 wide 2 Inst. 238. (d) Where the jury may give 10*l.* costs, though they give but 10*l.* damages on the
 statute 21 Jac. 1. c. 16. Salk. 207. and *vide tit. Costs.*

3. Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received; and herein of assessing entire Damages.

10 Co. 117. If in a writ of entry *sur disseisin*, or in nature of an assise, a writ of inquiry of damages is awarded, the plaintiff shall recover his damages but from the time of the disseisin to the time of the award of the inquiry of damages, and not after, though the writ of inquiry be not served till seven years after; and if in such writ an issue is joined triable by verdict, he shall recover damages but from the time of the disseisin to the time of the verdict.

10 Co. 117. But in a *præcipe quod reddat*, of a rent of the possession of the
 (a) But in personal ac-
 tions the
 plaintiff shall
 recover damages only for the tort done before the action brought. 10 Co. 117.

Co. Lit. 257. The dissesee, in an action of trespass, may recover damages for the first entry without any regrefs.

Co. Lit. 257. But after regrefs he may have trespass with a *continuando*, and
 therein recover for all the mesne occupation as well as for the first
 Abr. 550. entry.

Co. Lit. 257. 2. So, in an action upon 5 R. 2. cap. 7. for entering into land,
ubi ingressus non datur per legem terræ, the plaintiff shall recover
 damages for the first *tortious* entry only.

Co. Lit. 257. But in an action upon 8 H. 6. cap. 9., where one enters by
 force, or enters peaceably and detains with force, or when one
 enters with force, or detains with force, the plaintiff without any
 regrefs shall recover treble damages, as well for the mesne occu-
 pation as for the first entry.

Hob. 189. If in case, for not grinding at the plaintiff's mill, the plaintiff
 Harbin and
 Green,
 Moor, 887. derives his title under a lease made to him 11 Jac., and then sets
 S. C. forth, that the defendant at several times, from 2 Jac. to 12 Jac.
 Carth. 387. did grind his corn elsewhere, he cannot have judgment, though
 1 Ld. Raym. after verdict, because the damages are assessed for all that time,
 248. viz. from 2 Jac. to 12., whereas the plaintiff's lease commenced
 11 Jac.; so that the damages are given to the plaintiff before he
 131. had any title.
 Comb. 442.

2 Salk. 663. S. P. and S. C. cited. See Ld. Raym. 329. Comyns 231. pl. 129.

2 Saund. In case the plaintiff declared, that J. S. 19 Sept. 16 Car. 2.,
 169. Ham- was retained as an apprentice to serve the plaintiff for nine years,
 bleton and continued in his said service till the 31 Oct. 21 Car. 2., when
 Veere, Lev. the defendant procured the said J. S. to leave the plaintiff's ser-
 299. S. C. vice, (b) *per quod* the plaintiff *totum proficuum quod ratione servitii*
 Carth. 261. *præd.* J. S. *per totum residuum termini recipere potuisset totaliter per-*
 S. C. cited. *didit*; and (c) after verdict for the plaintiff, and general damages
 (b) The given, though it appeared the term was not expired, it was in-
 plaintiff de- tended
 clared for a
 battery of

tended that damages were given for all the term, as well the time (d) to come as past; for the damages must be intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given.

his servant, 19 Jan. &c. per quod he lost his service for a long time, viz. for the space of six months then next following, &c. Hob. 284. After a verdict for the plaintiff, though the original bore *teste* before the end of the six months; yet the plaintiff had his judgment, for the *viz.* was more than needed, being not of the substance of the action, but for aggravation of damages only. Allen 23. per curiam, but yet vide Cro. Jac. 619. Yelv. 94. (c) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. Mod. 271. (d) For this *vid.* 3 Mod. 286. Carth. 389.

In trespass, the plaintiff declared, that upon the second day of July, anno 5 W. 3. &c., and from thence to the time of the action, he was possessed of two meadows adjoining to a river; and that the defendant, Aug. 2. in the same year, exalted his mill-banks to that degree, that thereby the water overflowed his (the plaintiff's) meadows, per quod he lost the use and profit of his meadows, from the said second of July to the time of the action; and after verdict and entire damages, judgment was arrested; for it was impossible that he should lose the use, &c. before the fact was done.

Carth. 386. Prince and Meulton, 2 Salk. 663. pl. 5. S. C. Comb. 442. S. C. Id. Raym. 248. S. C. [Yalden v. Hubburb, Com. Rep. 231. 2 Ld. Raym. 1382.]

But where in trespass for erecting and continuing 300 perches of stone wall on the soil of the plaintiff 2 April an. 2 W. & M. transgression. predict. quoad continuation. mur. pred. a 20 die Feb. anno primo W. & M. usque diem exhibitionis billae continuando; it was objected, that the continuance being laid for one year before the commencement of the trespass, and entire damages being given, all was void; yet it was adjudged, that the continuance being for a time before the commencement of the action was senseless and void; and it cannot be intended that any damages were given for a matter which was void in itself.

Carth. 230. Bridges and Horner.

In case, for stopping lights by erecting a new structure, the declaration concluded, that occasione premissorum magna tenebritate obscurat. fuit & adhuc existit, &c. after verdict and entire damages, it was objected, that by adhuc existit, the jury had given damages for a matter subsequent to the action, and that no damages can be given for a matter after the action commenced (a); because if another action should be brought for the same thing, the former action could not be pleaded in bar to it; but it was resolved, that the adhuc should (b) refer to the time of the plaint levied, and not to the time of the declaration.

Carth. 261. Carter and Cawthrop, 4 Mod. 152. S. C. 3 Lev. 345. S. C. 1 Show. Rep. 366. S. C. [(a) In trespass, tort, &c. new actions may be brought for matter

subsequent to the depending suit, and therefore damages cannot be given for it: but it is otherwise where a duty or demand has arisen, pending the writ, for which no satisfaction can be had by a new suit, for there such duty or demand shall be included in the judgment upon the action already depending; as in the old writ of annuity; assumpsit for principal and interest, upon a contract obliging the defendant, the principal with interest from such a time. Robinson v. Eland, 2 Burr. 1086.] (b) But in an action de uxore abducta, and keeping her from him usque such a day, which was some time after the exhibiting of the bill, judgment was stayed, for the jury shall be intended to have given damages for the whole time mentioned in the declaration. Vent. 103. See 10 Mod. 273. 274.

If an action upon the case be brought for speaking words all at one time; and upon not guilty pleaded, verdict be given for the plaintiff; though some of the words will not maintain the action,

Roll. Abr. 576. But for this, and for what

things the damages shall be laid to be given, *vide* Godb.

343. Moor,

141. pl. 283. 708. pl. 987. Cro. Eliz. 329. 788. Bullt. 37. 3 Bullt. 283. Cro. Car. 237. 328.

March 48. Sid. 38. Winch 33. — * But, if the declaration consists of several counts, all the words in some of which are not actionable, and there is not any special damage laid, or if laid, not found, and a general verdict is taken for the plaintiff, (except as to the special damage, if any laid, and that is found for defendant,) the judgment will be erroneous, and may be avoided, by motion in arrest of judgment, or reversed, on error brought. — [It is the rule of the court of C. P. to award a *venire facias de novo* in such case, upon payment of costs, that the plaintiff may sever his damages. *Anger v. Wilkins*, Barnes 478. *Smith v. Haward*, *Id.* 480.]

Moor, 708.

pl. 987.

Cro. Eliz.

329.

Bullt. 37.

3 Bullt. 283.

Cro. Car.

237. 328. Hutt. 131. Roll. Abr. 576.

But if the action be brought for several words spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another time; and upon not guilty pleaded, a verdict be found for the words, and entire damages given; this is not good. See *supra*, n.

10 Co. 130.

a. 132. b.

(a) *Trover*

de uero rifo,

(*Anglice* a

trunk full

of linen,

&c.) and

damages in-

tended to be

given for

the trunk

only. Cro. Jac. 665.

If the plaintiff declares that he bought of the defendant *diversa bona & catalla, viz. unum fulcrum lecti* (*Anglice* a field bedstead) with a tester and curtains of say, *unum canspium* (*vocat.* a canopy) &c. and that the defendant assumed to deliver *bona pred.*, but had not, &c. and there is a verdict for the plaintiff, and general damages given, it shall not be presumed that any damages were given for the tester and curtains, which (a) were not alleged *positive*; but only *expositive* and this exposition is too extensive, for *fulcrum* signifies the bedstead only.

2 Roll. Rep.

178. Steel

and Spight,

(b) *A.*

brought an

action in an

inferior court for

slandering him in his trade,

by which he lost his custom,

within the jurisdiction of

that court & *alibi*; and it was held

maintainable, notwithstanding the

alibi. Vent. 104. cited, by

Twissden to have been adjudged.

If in an action upon a covenant divided into two (b) branches, the breach is assigned in one part only, &c. and the jury assess damages generally *pro fractione conventionis pred.* this shall have relation to that part only in which the breach was assigned.

Styl. 161.

Cressit and

Burgis.

(c) An ac-

tion upon

the sale of

several

things for

divers sums

of money, *quæ quidam pecuniarum summe attingunt ad 10 l.*, whereas rightly computed, they

came but to 9 l., the jury gave damages less than 9 l. and it was held good; but if the verdict had been

for 10 l. it had been naught. Vent. 104. cited by Twissden to have been adjudged.

If in debt upon 2 *E. 6.*, for not setting forth tithes growing upon seventy acres of land, &c. the jury as to sixty-six acres give damages, &c. and as to the five acres residue, give damage, &c. whereas it ought to have been, as to the four acres residue; yet this being only (c) a miscounting of the jury, and no damage to any thereby, the plaintiff shall have his judgment.

Sid. 96.

(d) But

with such

recital, it

would not

have been

presumed

that damages

If in trespass for an assault, battery, and wounding, the defendant, *quoad* the force, pleads not guilty; and *quoad* the assault and battery, that he was removing a market-cross to a more convenient place, and the plaintiff interrupted him, *per quod molitur manus imposuit*, &c., and thereupon they are at issue, and the jury find the defendant guilty *de injuriâ suâ propriâ*; and so (d) recite the

the entire declaration of the assault, battery, and wounding, (though the wounding was not in issue,) and assesse damages *occasione transgressionis illius* to 20l., it must be intended, that the damages were given for all in the declaration, viz. the wounding, though not in issue, and the jury cannot find (a) more than the plaintiff has declared for, and assesse damages for it.

were given for what was not in issue. Hob. 187. Cro. Jac. 353. (a) Nor can they give damages for what they have not found. Bullt. 64.

If in trover, *inter alia de una falsura* (*Anglice a salting trough*), there is a verdict for the plaintiff and entire damages; the declaration as to the trough being merely in *English*, the damages shall be intended given for the other particulars; but if the defendant had been acquitted of the other things, and expressly found guilty of this, it would have been otherwise.

Sid. 98. Lev. 99. For this see 10 Co. 133. Raym. 15. 3 Lev. 336. Ld. Raym. 317. Carth. 437. Morrice and Golder, adjudged, and a *remittitur* entered accordingly.

If in an avowry for rent due in money, and also for so many hens, it appears on the face of the avowry that the hens were not due at the time of the distress taken; although there are entire damages and costs, yet the plaintiff may release the damages and rent for the hens, and take judgment only for the rent in money (b), but need not release the costs.

(b) Byars as adjudged.

and Newton, Trin. 28. Car. Rot. 728. S. P. said to

If an action upon the case is brought (c) upon two promises (d), and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff; but if the action does not lie for one of them, the plaintiff (e) shall not have judgment for the other (f).

Roll. Abr. 570. Roll. Rep. 423. 3 Bullt. 258. S. C. the judgment being given

on demurrer and entire damages assesse upon a writ of enquiry. (c) So, in other actions upon the case. Moor, 707. pl. 987. Cro. Eliz. 560. Hob. 189. 10 Co. 130. Moore, 281. — So, in debt. Brownl. 70. — So, in trespass. Styl. 174. 182. 399. 3 Leon. 213. Cro. Car. 21. Godb. 57. — So, in covenant. Cro. Eliz. 685. Cro. Jac. 439. Sand. 155. — And for this *vide* 5 Co. 108. a. 10 Co. 130. 3 Bullt. 231. Hetl. 51. 53. Lit. Rep. 61. Styl. 198. Cro. Eliz. 59. Cro. Jac. 239. Sid. 38. Moore, 281. [1 Stra. 621. Folt. 376. Andr. 21. 2 Ld. Raym. 1381.] (d) So, where the plaintiff alleges two breaches of an award, one of which is insufficient, and entire damages are given. Leon. 170. 5 Co. 108. 10 Co. 131., but *vide* Yelv. 35. and tit. *Arbitrament*. (e) Where entire damages shall hinder the plaintiff's judgment, *vide* 2 Roll. Abr. 90. — [(f) But if one of the promises be impossible, or impossible to be performed, and there be a general verdict for the plaintiff with entire damages, the judgment will not be arrested; because it is not to be intended, that any part of the damages was assesse as to such a promise. 1 Roll. Abr. 577. pl. 5, 6. But a distinction is made by Lord C. J. Vaughan, in *Nichols v. Reeve*, 1 Freem. 83. between a legal impossibility of performing a promise, and a physical one; that it is only with respect to the latter that the above rule holds: for in the other case, *non constat* to the jurors whether the promise be good or not in law, and therefore the presumption is, that they gave damages for it.]

So, where an action against an administrator was laid as follows, *ff. In consideration that the plaintiff had sold a mare to the intestate, he promised to pay the plaintiff tantum denariorum summam quantam equa predicti. rationabiliter habere meruit*, and then avers in fact, *quod equa predicti. rationabiliter habere meruit 8 l.*; which last promise being void, it being absurd to say that the mare deserved to have so much money, makes the whole void. which there were entire damages, reversed accordingly.

Carth. 254. Blackman and Cobbet, adjudged, and the judgment of the court of C. B. in

4. Where to be assessed jointly or severally, where there are several Defendants.

11 Co. 6. b. The jury cannot regularly assess (a) several damages for one
Cro. Eliz. trespass, with which the defendants are jointly charged by the
860. Cro. plaintiff's writ or declaration; for though in fact one was more
Jac. 118. malicious, and did greater wrong than the other, yet all coming
384. Roll. to do an unlawful act, the act of one is the act of all the parties
Rep. 31. present.
Hob. 66.
vide Bult.

157. (a) For by finding them guilty *de præmissis*, they find them equally guilty, and it is a rule in law, that what the plaintiff had laid joint in his declaration, the jury cannot sever in their verdict. Carth. 20. *arguendo*.

11 Co. 6. b. But in trespass, if one defendant is found guilty at one time,
Brownl. and the other at another time, several damages may be (b) taxed.
233. S. C.
(b) And the plaintiff hath election to take execution *de melioribus damnis*. 3 Mod. 102.

Cro. Car. So, where they plead several pleas, as in an action of battery, if
239. Walfsh one pleads not guilty, and the other justifies, and both issues are
and Bishop. found for the plaintiff; in such case he may enter a *nolle prof.*
3 Mod. 102. against one, and take judgment against the other, because their
S. C. cited. pleas are several.

11 Co. 6. b. If in trespass against two, one appears against whom the plain-
Roll. Rep. tiff counts *simul cum*, &c. who pleads, and is found guilty and da-
31. S. C. mages assessed, and after the other appears and pleads, and is
10 Co. 119. found guilty, he shall be charged with the damages taxed by the
first jury.

11 Co. 5. b. If in trespass against *A. B. and C.* for a battery and wounding,
Sir John *A.* appears, and the plaintiff declares against him, *simul cum*, &c.
Heyden's *A.* pleads not guilty, and a *venire* issues, &c. and after *B.*
case. Cro. appears, and the plaintiff declares against him *simul cum*, and *B.*
Car. 102. pleads not guilty, and a *venire* issues, and both these issues are
Like point tried at the same assizes, *viz.* that against *A.* is first tried, and
in an appeal 200 *l.* damages given; and after that against *B.* is tried, and 50 *l.*
of mayhem. damages given; and after *C.* appears and confesses the action,
(c) In tresp- and a writ of inquiry is awarded upon the roll, but none issues,
sals against the (c) plaintiff at his election may have judgment for the damages
A., B., and given by the jury, and this shall bind all, for in judgment of law
C., A. and the several juries gave their verdict at the same time.
B. justify; upon which there is a demurrer,
there is a demurrer, and *C.* pleads, thereupon issue is joined, and the demurrer is adjudged against *A. and B.*, and upon writ of enquiry damages are given; and after, the issue is found for the plaintiff, and damages given: the plaintiff may have his election, which damages he will take. Roll. Rep. 395. *per Cur.* Cro. Jac. 350. S. C. adjudged upon a writ of error; and the first judgment affirmed accordingly, because the writ is entire, and the defendants are all charged with one battery, though the declarations are several. Roll. Rep. 30, 31. S. C. [1 Will. 30.]

Noke v. [So, where two defendants in *assumpsit* severed in pleading, and
Ingham, the one pleaded a bankruptcy, which, on issue joined, was found
1 Will. 89. for him, it was holden, that the plaintiff might enter a *nolle*
prosequi as to him, and still proceed to final judgment and execu-
tion against the other.]

Cro. Jac. In trespass for an assault, battery and wounding, the defendant
251. And if *quoad* the battery and wounding pleads not guilty, and *quoad* the
the damages assault

assault justifies, and both issues are found against the defendant, several damages shall not be found, for the assault is included in the battery and wounding.

should be found severally, it would be double.

If in trover and conversion of 2000 loads of coals, upon not guilty pleaded, the defendants are (a) found severally guilty for several loads of coals, and severally not guilty for the residue; the jury must assess several damages (b); adjudged upon a writ of error in the *Exchequer-Chamber*, and judgment against them severally for damages, according to the verdict, and intire costs.

Cro. Car. 54. Player and Warn. (a) So, in trespass, if one defendant is found guilty in part only, and the other in all, the damages shall be several. Cro. Eliz. 860. Brownl. 237. Bull. 50. (b) But *vide* Carth. 20., where it is said that the contrary had been lately resolved in *C. B.* between Whorewood and Jackson. [And agreeably to that resolution the law is now settled. For where the count is of a joint trespass, and the jury find the defendants guilty of a joint trespass, or they all confess the trespass, the damages cannot be severed. Hill v. Groschuld, 5 Burr. 2790. Onslow v. Orchard, 1 Str. 422. Lowfield v. Bancroft, 2 Str. 910. Mitchell v. Milbank, 6 Term Rep. 199.]

In trespass and false imprisonment, and imposing the crime of treason on the plaintiff, against *A. B.* and *C. B.* confessed the action, *A.* and *C.* pleaded jointly not guilty, and were found guilty; the jury assessed damages, viz. 1000*l.* against *A.* and 50*l.* against *B.* and *C.* each; and the plaintiff entered a *nolle prosequi* as to *B.* and *C.*, and took judgment against *A.* only for the 1000*l.*: it was holden, that the defect of the verdict was (c) cured by the *nolle prosequi*; for as the plaintiff might have brought his action against them jointly or severally, so it is but reasonable that he should have the same election as to the damages; although it was objected that the plaintiff hath election *de melioribus damnis* only where the trials are at several times, and this was a fact of which they are all equally guilty, and that it was a contradiction to say that the plaintiff is injured by one to the value of 50*l.* only, and by the other to the value of 1000*l.*

Carth. 19. Rodney v. Strode & al. adjudged in B.R. Pasch. 2 J. 2, and affirmed in the Exchequer-chamber, as also in the House of Lords, 1 W. & M. and a like judgment said to be lately given in B.R. between Trobarefoot

and Greenway, 3 Mod. 101. S. C. Cro. Car. 243. Like case; where it is said, though damages ought not to have been taxed severally, yet the plaintiff relinquishing his suit against the other, it is not material, no advantage being taken thereof. [Though if several damages be assessed in such case, and judgment thereupon entered up, it would be error, yet is it no ground to arrest the judgment. Carth. 19. 6 Term Rep. 199.] (c) For this *vide* Rast. Ent. 127. 583. 634. Rell Abr. 784. Cro. Car. 54.

[If there be judgment by default as to part, and an issue upon other part, or in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special venire, as well to try the issue, as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury, who try the issue, shall assess the damages for the whole, or against all the defendants. In these cases, when the defendants who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the defendants who let judgment go by default, and in others not. In actions upon contract, as covenant (d), *assumpsit* (e), &c. the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment of damages against the others, who let judgment go by default. But in actions of

Tidd's Pr. 591. 11 Co. 5.

(d) 1 Lev. 61. 1 Sid. 76. 1 Keb. 284. S. C. (e) Ca. Pr. C. B. 107. Pr. Reg. 102. S. C.

3 Term
Rep. 662.

fort, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such, as shews the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default (a): but where the plea merely operates in discharge of the party pleading it there, it shall not operate to the benefit of the other defendants, but notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants (b).

(a) 2 Ld.
Raym.
1372.
1 Stra 610.
(b) 2 Str.
1108. 1122.
Tidd's Pr.
592.

If there be a demurrer to part, and an issue upon other part, or, in an action against several, if some of them demur, and others plead to issue, the jury who try the issue shall assess the damages for the whole, or against all the defendants.

2 Str. 1140.
1222.

But if in trespass, one defendant lets judgment go by default, another demurs, and a third pleads to issue, and is acquitted, the plaintiff may assess several damages against the others.

Snow v.
Como,
1 Str. 507.

If there be a demurrer to one count, and an issue on the other, and the plaintiff be nonsuited on the issue, contingent damages cannot be assessed on the demurrer.]

(E) Where the Court may increase or mitigate the Damages.

Roll. Abr.
(c) In tres-
pass for cut-
ting his
trees, upon
not guilty

IN (c) all actions at *nisi prius*, where damages are the principal, as the court can have no certain conscience of the cause, either by record or other matter apparent, they can neither mitigate nor increase the damages.

pleaded, the court cannot increase the damages given by the jury, because it lies not in their conscience. 3 H. 4. 4. Bro. Coils 7.—Nor can they diminish them, because the trespass is local, and it cannot appear to them what the damages were. Brownl. 204.—So, in case for words, though the court thought the damages excessive, yet they would not mitigate them. Palm. 314. And though at first they inclined to do it, yet upon great consideration they resolved to leave such matters of fact to the trial of the jury, who best know the quality and estate of the person, and the damages he hath sustained.

22 E. 3. 11. But in (d) battery *pro amputatione manus dextra*, the court may increase the damages, for it is apparent to the court by the record and (e) view of the person.

139. 6 done. (d) So, in an appeal of mayhem, upon view of the mayhem. 3 H. 4. 22. 3 Aff. 30. —In an appeal of mayhem the jury gave 20 marks damages, and upon view in court, and information of the surgeons there present, the court increased the damages to 100 l. because he lost the use of his hand. Roll. Abr. 572. Freeman and Trevers. (e) It is not sufficient that the justices of *nisi prius* upon view thereof, certify that he had sustained damages to such greater sum; for the justices of the court, out of which it issues, cannot increase the damages without their view. 8 H. 4. 23. Roll. Abr. 572. 3 Salk. 115. pl. 6. Ld. Raym. 176. —But upon a view *in pais* by any of the justices of the court into which the *nisi prius* is returned, they may increase damages. 8 H. 4. 23. Bro. Damages 74.

19 H. 6. 10.
adjudged.
Roll. Abr.
573. Styl.
310. S. C.
adjudged.
(f) Justs-

So, in trespass, if judgment be given upon *nihil dicit*, and a writ of inquiry of damages executed, the court may increase or (f) diminish the damages found by the inquest; for that they might have awarded damages, according to their discretion, without such writ :

writ: adjudged in an action of assault, battery and wounding (a); the manner of doing thereof being specially laid in the declaration, though the inquest gave 200*l.* damages, yet upon examination of surgeons, and upon view of the wound in court, and for the heinousness of the fact, being done in the high street in the day-time with a stiletto, with an intent to kill him; and the surgeon by agreement being to have 150*l.* for the cure; the plaintiff being in great danger of death, and having lost a pottle of blood, as the surgeons said, the court increased the damages to 400*l.* *in toto*; and judgment given accordingly.

ment in battery by *non sum informatus*, and upon a writ of inquiry of damages found, &c. And upon a motion to mitigate the damages, the court

said, that in such cases they never alter the damages. Lit. Rep. 150. Hetl. 93. Ld. Raym. 176. (a) Otherwise, if the wounding be not particularly expressed in the declaration, that the court may judge thereof by the record; for it ought to appear that the wounding was by this battery, and the party is not to be viewed in court by a bare averment at the bar. Styl. 345.—So, in an appeal of mayhem, when the particulars of the mayhem are not expressed in the declaration, the court upon view of the mayhem cannot increase the damages, unless the judges of *nisi prius*, before whom tried, certify the particulars of the mayhem to the court; or where tried before a judge of the same court, who affirms that these are the mayhems that were proved upon evidence; otherwise *non potest constare curiæ*, that these are the same mayhems for which the plaintiff has declared. Latch 223. Sid. 108. 177. [In Austin v. Hilliers, Hardr. 408., it was adjudged, that the damages may be increased, if the word *maibement* be in the declaration, though the better way is to express the manner of the maihem. And in another case, the court seemed to think a declaration that the defendant assaulted and maimed the plaintiff in his left hand, particular enough. Brown v. Seymour, 1 Will 6. If the wound be apparent, though it be not a maim, the damages may be increased by the court. Cook v. Beal, 1 Ld. Raym. 176.]

In trespass for an assault and battery against *A.* and *B.*, *A.* appeared, &c. and a verdict was given against him, and damages taxed to 30*l.* and the court upon view of the mayhem increased the damages to 40*l.* and after a verdict was given against *B.* and damages taxed; and then it was moved that the court, upon another view of the wound, would increase damages against *B.*, for that *A.* had murdered the officer that came to serve the execution upon him for the 40*l.*, so that possibly the plaintiff might recover nothing against *A.* But it was denied by the court, for that they could have the view but once in the same action; though if he had brought several actions, it would have been otherwise; but the court directed the plaintiff to stay till *A.* was hanged, and then they might have the view and increase the damages. Lit. Rep. 51.

In trespass *Quare insultum fecit et maletraxavit* the wife of the plaintiff, *et equam*, upon which the wife rode, *percussit*; so that the wife was thrown, and another horse trod upon her, *per quod* she lost the use of three fingers, &c.; there was a verdict for the plaintiff, and 8*l.* damages; and the court refused to increase the damages upon view of the mayhem and hearing surgeons, because there was no mayhem or wounding directly done by the party, but rather by accident, *viz.* by the coming, &c. of another horse, which, whether he came, &c. or the wife might have avoided him, is matter of evidence.

Sid. 433.
Burford and his Wife v. Dodwell,
Mod. 24.

The courts have a general discretionary power, except in special cases, as (b) local trespasses, &c. either to increase or abridge the damages found by an (c) inquest of office.

Roll. Abr. 573.
(b) 27 H. S. 2. pl. 8.

10 H. 6. 10. pl. 28. Brownl. 204. (c) In action for taking his goods, if the defendant avows, upon which it is demurred, and adjudged for the plaintiff, or upon default, and damages found upon the writ of inquiry of damages, the court may increase them; for the court (this being upon demurrer) might have awarded damages without inquiry; and therefore the inquest is but for their information.

14 H. 4. 9. 3 H. 6. 29. b. Yelv. 152. Brownl. 211.—But where on a writ of inquiry the court refused to mitigate damages, *vide* 3 Leon. 150. Godb. 135. Lit. Rep. 150. Hetley 93.—
 * *Qu. de hoc?* The constant practice is, to award a writ of inquiry to the sheriff who summonses a jury, to assess the damages, which done, the inquest is returned to the court.

13 Hen. 4.
 7. b. *vide*
 Roll. Abr.
 578.
 All. 88.
 † *Qu. if this*
 is law? The
 plaintiff
 might have
 produced his
 evidence be-
 fore this as well as before another jury; and whether setting aside the verdict would not be more proper?

In trespass for taking his goods to the damage of 20*l.* if the defendant pleads an arbitrament made in another county, and this is tried against the defendant, and damages assessed for the trespass; yet in as much as this foreign jury could not have full consufance of the trespass, and the defendant hath not denied the damage to be according to the count, the court with the assent of the plaintiff may increase the damages, and to so much as the plaintiff hath counted †.

2 Hawk.
 P. C. c. 23.
 § 147.
 (a) By the
 statute 3 E.
 1. c. 20. it
 is enacted,
 that if a
 trespasser in
 parks and
 ponds is at-

On the statute of *West. 2. cap. 12.*, which gives damages to an appellee on a false and malicious appeal; if the jury give too great damages, the court may abridge them; or if they give too small damages, the court may increase them; for after the acquittal of the appellee, their inquiry as to damages is to be considered only as an inquest of office; also the (a) words of the statute are, *Damages shall be given according to the discretion of the justices, &c.*

tainted at the suit of the party, great and large amends shall be awarded, according to the trespass; in the explanation of which statute, it is said, that if the damages are too small, the court hath power to increase them. For that the word *award* properly belonged to the court. 2 Inst. 200.—* If there is a judgment by default or confession, and the certainty of the demand appears upon record, the court may assess damages, without awarding a writ of inquiry, if they will. 2 Sand. 107.—So, if there be judgment for the plaintiff on demurrer.—So, in debt—(where generally, if not always, the damages are nominal).—But where the demand is not certain upon the record, or where the damages are not merely nominal, and judgment is for plaintiff on demurrer, by default, or confession, and the damages are not confessed, a writ of inquiry should issue. See Yelv. 152. 3 Leon. 213. Lut. 211. 213. 11 H. 7. 5. b. Cro. El. 536. For damages are to be proved, by a *viuē vice* examination of witnesses, which is not the proper province of the court. *—[But in actions upon promissory notes and bills of exchange, it is the practice, instead of executing writs of inquiry, to apply to the court for a rule to shew cause, why it should not be referred to the master to see what is due for principal and interest; and why final judgment should not be signed for that sum without executing a writ of inquiry; which rule is made absolute, on an affidavit of service, unless good cause is shewn to the contrary. *Shepherd v. Charter*, 4 Term Rep. 275. *Raffleigh v. Salmon*, 1 H. Bl. 252. *Andrews v. Blake*, *Id.* 529. *Longman v. Fenn*, *Id.* 541. This practice, however, is confined to actions upon promissory notes and bills of exchange, where the quantum of damages depends upon figures, which may be as well ascertained by the master as before a jury: and, therefore, where the defendant had suffered judgment by default, in an action of *assumpsit* on a foreign judgment, the court refused to make the rule absolute for a reference to the master; saying, this was an attempt to carry the rule further than had yet been done, and as there was no instance of the kind, they would not make a precedent for it. *Messin v. Lord Massareene*, 4 Term Rep. 491. In a subsequent case, *viz.* *Maunsel v. Lord Massareene*, 5 Term Rep. 87., the court refused to make the rule absolute in an action on a bill for exchange for foreign money; the value of which is uncertain, and can only be ascertained by a jury. *Cuming v. Munro*, 5 Term Rep. 87. *Bagshaw v. Playn*, Cro. El. 536. *Rend. v. Peck*, Cro. Ja. 617.]

(F) Of the Manner of assessing and recovering Damages.

Yelv. 176.
 (b) So, on
 the statute
 of *Weston. 2.*
 c. 75. The
 court shall double the damages.

IF trespass is brought against overseers of the poor, &c. for any act done by authority of 43 *Eliz. cap. 2.*, and there is a verdict for the defendant, the jury shall assess the damages which shall be (b) trebled by the court.

2 Inst. 416.—So, on the statute 23 H. 6. c. 10. Cro. Car. 438.

(a) No damages can be given to the party grieved upon an indictment, or any (b) other criminal prosecution; and where, by statute, damages are given to the party grieved by the offence intended to be redressed, they cannot be recovered on an indictment, grounded on such statute, unless such method of recovering them be expressly given by the statute (c); but they ought to be sued for in an action on the statute, in the name of the party grieved; yet the court may, by (d) virtue of a privy seal, give to the party injured part of the fine set on the offender, or (e) may induce a defendant to make satisfaction to the prosecutors, by giving an intimation, that on that account the fine to the king shall be mitigated.

his damages by such a prosecution. Cro. Car. 558. 2 Hawk. P. C. c. 25. § 3. (c) Jon. 380. Cro. Car. 438. 448. (d) 1 Keb. 487 — May give the third part of the fine assessed. 2 Hawk. P. C. ubi *supra*. (e) Said to be every day's practice. 2 Hawk. P. C. ubi *supra*.

(a) Roll. Abr. 220. 2 Roll. Abr. 83. Cro. Car. 531. (b) Notwithstanding one king, by his commission, erecting a new court, expressly directs, that the party shall recover

In all actions in which the plaintiff is to be recompensed in damages, the jury must ascertain the damages by their verdict, nor can such omission or defect be supplied by writ of inquiry; for, if this were permitted, the party would be deprived of his remedy by attain against the jury for excessive damages; for no attain lies against them on a writ of inquiry, it being an inquest of office.

10 Co. 119. Latch. 113. Roll. Abr. 272. 2 Roll. Abr. 112. Skin. 595. pl. 8. Salk. 205. pl. 3.

So, in a writ *de valore maritagii*, where issue was joined on the tenure, and the jury assessed 40*s.* damages, and 10*s.* costs, but did not inquire of the value of the marriage; it was holden that this defect (f) could not be supplied by writ of inquiry.

10 Co. 118. b. Cheney's case. (f) So, in detinue, where the

jury gave a verdict, but omitted to inquire of the value of the goods. 10 Co. 119. b. But in Skin. 595. pl. 8. and Salk. 205. pl. 3., this point is said by *Holt*, C. J. to have been otherwise determined, but, as he thought, contrary to law, being against Cheney's case.

If there be (g) a demurrer upon evidence, though the jury are thereby discharged of the issue, yet they may tax damages conditionally, *viz.* if judgment shall be given for the plaintiff, or when the demurrer is determined, it (h) may be done by (i) writ of inquiry, and said to be the most usual course where there is a demurrer to evidence to discharge the jury without further inquiry.

Cro. Car. 143. Styl. 22. (g) Where there is a demurrer to part, and issue to part. 2 Roll. Abr. 722.

(b) Where an omission of taxing damages by the jury cannot be supplied by writ of inquiry, but a *venire facias de novo* shall go. 2 Roll. Abr. 321. — Where the court will refuse a writ of inquiry, but will award a *new venire*. 22 E. 3. 5. Roll. Abr. 571. (i) Where upon a writ of inquiry the plaintiff is not bound to prove his property. Cro. Jac. 220. Yel. 151. Brownl. 214.

If in debt upon a bill obligatory, the plaintiff hath judgment (k) by default, the court, by the assent of the plaintiff, which is always entered upon record, may tax the damages *occasione detentionis debiti*. (l), but if he will not assent thereto, he may have a writ of inquiry; but this election is in the plaintiff, not in the defendant: also, it is said to be the course and practice of both courts upon a judgment in debt (m), by default or confession, to tax damages as well as costs.

2 Saund. 106, 107. Holdip and Otway, Sid. 442. S. P. Fitz. Bar. 283. (k) So, if a verdict is found for the plaintiff,

and the jury do not assess damages, &c. for the debt is certain, and the loss of the plaintiff apparent. *Pyer*, 105. in margin. — In replevin, the plaintiff is nonsuit; the court, without a writ of inquiry, may assess

affects damages, because they accrue not in respect of any local matter, but it is the delay in the non-payment of the rent ; *secus*, where judgment is given for the plaintiff, for he ought to recover for taking his cattle, and the damages may be greater or less, according to the value of the cattle and circumstances of taking. 3 Leon. 213. (l) Cro. Jac. 415. (m) So, upon demurrer. Latch. 113.

Salk. 205. If in replevin, the defendant avows as overseer of the poor for a distress for a rate, upon the 43 Eliz. cap. 2. and on the trial the plaintiff is nonsuit, if the jury omit to find damages, this omission will be supplied by writ of inquiry ; for if the jury had inquired, they had inquired only as an inquest of office, on which no attaint lies.

10 Co. 119. Also, the omission of the inquiry of the value of the church
Salk. 205. in a *quere impedit*, may be supplied by a writ of inquiry.
S. P. agreed.

Sid. 380. But in an avowry for a rent-charge, according to the 17 Car.
Salk. 205. 2. cap. 7. the omission of the jury cannot be supplied by writ of
Salk. 205. inquiry ; for that statute expressly requires, that the same jury
pl. 3. 200. shall enquire of the rent arrear, value of the cattle, &c.
Salk. 205. cited, and agreed to be law. See 10 Mod. 319.

Debt.

- (A) In what Cases an Action of Debt will lie.
- (B) At what Time it shall be said to have accrued.
- (C) Who may bring Debt: And herein of the Privy of Contract and Estate.
- (D) Against whom it may be brought.
- (E) Where Debt is the proper Action, and not Covenant Case, &c.
- (F) Of the Manner of bringing the Action, and where it must be brought in the *Debet* & *Detinet*, or *Detinet* only.
- (G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

(A) In

(A) In what Cases an Action of Debt will lie.

AN action of debt is said to be founded upon contract, either express, or implied; in which the (a) certainty of the sum or duty appears, and therefore the plaintiff is to recover the same *in numero*, and not to be repaired in damages by the jury, as in those actions which found only in damages; as *assumpsit*, *trover*, &c.

action of debt. — If upon a submission to arbitration, the arbitrators award the payment of a certain sum of money, debt lies; but if they award the doing of something advantageous to the party only, an action on the case. *vide tit. Arbitrament and Award*. If one makes a bill to another in these words, *memorandum, I owe to A. B. 20 l. to be paid in watches*; an action of debt, &c., must be brought for the money, and not an action for the watches, for the number of watches is not certain. *And. 117.*

But if in an (b) action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring an action of debt for those damages.

Roll. Abr. 600, 601., several cases to this purpose. — [Debt will lie on a foreign judgment, without stating in the declaration, or proving the giving of the judgment. *Walker v. Whitser, Dougl. 1.*]

Also, if after judgment for the plaintiff in *B. R.* the defendant brings a writ of error in (c) *cam. scacc.*, an action of debt may be brought in *B. R.* upon the judgment, pending the writ of error; and the defendant cannot plead *nul tiel record*; for by the writ of error the transcript of the record only is removed*.

brought in parliament. *Sid. 236.* But for this *vide Style, 124. Mod. 121. 3 Lev. 397. 2 Vent. 261. 3 Keb. 330. and title Error*. — *But, the court on motion, will stay the suit, the defendant giving judgment, and make a rule to stay execution till the writ of error on the principal judgment is determined.

Debt lies in the *Marshallsea*, or any other court, upon judgments in *C. B.* or *B. R.*, and upon *nul tiel record*, the issue shall be tried by *certiorari*, and *mittimus* out of Chancery.

Every contract must be legally (d) entered into, and the (e) consideration thereof must be lawful, otherwise an action of debt will not lie.

by deed acknowledges, that he hath so much money of *J. S.*'s due to him, in his hands, though here is no contract of borrowing between them, yet *J. S.* may have an action of debt against him. *11 H. 6. 39.* (e) As marriage, work, soliciting a cause, &c. *vide Roll. Abr. 593.*, several such instances; — but not for money won at play, though an action on the case will lie; but for this *vide title Gaming*, and *5 Mod. 13.*

If a sheriff levies a certain sum of money on a *levari facias*, at the suit of *J. S.*, and returns the writ (f) served, *J. S.* may have an action of debt against the sheriff, without any actual contract; for the levying of the money to the use of *J. S.* is a contract in law, that he should pay it over.

of the sheriff, *vide title Sheriff*, and *title Executors and Administrators*. (f) Otherwise, where he returns, that he hath taken goods into his hands to such a value, which remain *pro defectu emptorum*. *Cro. Jac. 514. 2 Roll. Rep. 57. Godb. 276. And vide March, 13.* — But if he returns, they were received from him, he shall be charged; for he might have taken the *posse comitatus*, &c. *2 Saund. 343. Cro. Jac. 514. Godb. 276.*

Roll. Abr. 598. If (a) a statute prohibits the doing of a thing under a certain penalty, and prescribes no particular method for the recovery thereof, the party entitled to the penalty may recover the same by action of debt.

(a) As 14 H. 8. c. 5. against practicing physic without licence. — 2 and 3 Ed. 6. c. 13., which gives the treble value for not setting forth tithes, *vide* head of *Tithes*. Roll. Abr. 598., and which is now the common practice.

Roll. Abr. 508. Latch. 17. 51. An action of debt lies by a sheriff upon the statute of 28 Eliz. cap. 4., for his fees given by the statute, for an execution served by him; though the statute does not say that he shall have his fees, or any action for them, but only says, that he shall not take, for (b) any execution served, any consideration or recompence besides that thereafter in the said act mentioned, &c. (b) The sheriff brought debt for his fees of executing an *elegit*; and held by Holt, that it lay; for it is all the execution the plaintiff in the original action can have on this judgment; and he may enter on the land extended, if he can, without force. Saik. 209. pl. 2. *vide* Cro. Car. 286.

Co. Lit. 162. a. The action of debt is a proper remedy which the law gives for the recovery of rents reserved upon leases for (c) years; but this extended not to (d) freehold rents; the reason whereof, and how it is now remedied by 8 Ann c. 14. *vide* title Rents.

(c) Also, the grantee for years of an annuity may have an action of debt for the arrears. Cro. Eliz. 268. 895. (d) But if there had been tenant for life of a rent, and he died, the rent being in arrear, his executor, by the common law, might have an action of debt for the arrears, because there was no other remedy. 4 C. 49. a.

Carth. 161. If a lessee for years assigns over his whole term by indenture, reserving rent, the lessee, by the name of rent, may recover in an action of debt upon the (e) contract; although it was objected, that the lessee having no (f) reversion, it was to be considered as a sum in (g) gross, and therefore not recoverable until the term was expired.

Newcomb and Harvey, adjudged. (e) Also, debt would lie against a second assignee. Carth. 162. *per Curiam*. (f) Husband possessed of a term in right of his wife, makes a lease for half the term, and dies; his executors shall have debt for the rent, and yet the feme shall have the reversion. Dyer, 227. (g) If a term surrenders to the lessor without deed, rendering rent; this is recoverable as a rent, and is not as a sum in gross. Vent. 272. 2 Lev. 80. adjudged.

Cro. Jac. 243. Yelv. 177. Bullst. 29. 31. If a man lend goods as a security for money, and the borrower tender the money, and recover the goods in an action of trover, yet the pawnbroker may have an action of debt for his money (b); because, though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came. The same law as to land.

(b) So, if a man lend perishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of debt for his money, because the duty continues. Yelv. 177. Co. Lit. 209.

Bro. Statute Merchant, 16. Moor, pl. 1097. Cro Eliz. 494. The conuzee of a statute-merchant, as also the conuzee on the 23 H. 8. c. 6., the statute and recognizance having the seal of the conuzors, as well as the seal of the king, may bring an action of debt, and waive the execution given by the statute; *secus*, of a statute-staple; because the king's seal only, without that of the party, is affixed to it.

Bonarous v. Walker 2 Term. If an officer entrusted with the custody of a prisoner, against whom judgment has been obtained, permit his escape, he is liable

to an action of debt, in which the very sum for which the party is charged in execution is to be recovered. But against his executors the suit is not *originally* maintainable (a).

1 Roll. Abr. 921.—This action in Saynd. 218. is referred to the common law: but in 2 Inst. 382., and 2 Term Rep. 129., to stat. Westm. 2., 13 E. 1. c. 11., and 1 R. 2. c. 12.

If an indenture of covenant contain a stipulated penalty for non-performance, the remedy is by an action of debt for such specific sum. By the same method the arrears of an annuity or rent-charge may be recovered (b).

Debt may be brought by the assignees of bail (c) and replevin (d) bonds, under particular statutes.]

§ 20. (d) Stat. 11 G. 2. c. 19. § 23.

(B) At what Time it shall be said to have accrued.

IF a man enters into a bill obligatory for the payment of (e) several sums of money at several days, an action of debt will not lie till the last day is past. Co. Lit. 47. b. 292. S. P. * In 292. b. it is more fully explained, viz. there it is said, "If a man be bound in a bond, or by contract to another, to pay 100*l.* at five several days, he shall not have an action of debt before the last day be past.—" But if a man be bound in a recognisance to pay 100*l.* at five several days, presently after the first day of payment, he shall have execution upon the recognisance for that sum, and shall not tarry, till the "last be past, for that it is in the nature of several judgments." 3 Co. 22. a. 128. b. Cro. Jac. 505. Cro. Car. 241. (e) If to pay 20*l.* in manner following, viz. 10*l.* at one day, and 10*l.* at another day, debt lies not till after the last day, because one entire duty; but if a man binds himself to pay 7*l.* S. 10*l.* at one day, and 10*l.* at another day; after the first day, debt lies for 10*l.* because it is in itself a several duty. Owen, 42. [Coates v. Hewit, 1 Will. 81. acc.] — So, if A. makes a bill to B. for the payment of 20*l.*, viz. 10*l.*, &c., and thereby covenants and grants with B. that if he makes default in either of the said payments, that he will then pay what of the whole shall be unpaid, after default at the first day, debt lies for the whole. Leon. 208. adjudged.

So upon a contract, debt lies not till all the days of payment are past, for where there is but (f) one contract, there can be but one debt, and consequently but one action of debt for the recovery of it. Co. Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51. S. P. [Ryder v. Price,

1 H. Bl. 547.] (f) But the law is otherwise of a covenant or promise to pay money, &c. at several days, for as often as the money is not paid, according to the covenant or promise, so often is there a breach of the covenant or promise, and consequently so often an action lies. Co. Lit. 292. b. [Cooke v. Whorwood, 2 Saund. 164. See too 1 H. Bl. 552.]

If a man leases lands for years, reserving yearly 20*l.* at four (g) quarters, debt lies for one quarter before the others are past; for it is reserved for the lessor's maintenance in lieu of the profits, and shall be considered as several contracts. Co. Lit. 47. b. 292. b. S. P. (g) So, if reserving weekly,

during the term, nine quarters of wheat. Roll. Abr. 601.; but for this *vide* Plowd. 172. Allen, 57. Raym. 222. 2 Lev. 80. Vent. 242. 272. Carth. 161., and title *Rent*.

If one enters into an obligation or contract to pay money, &c. on two several contingencies, the obligee may have an (h) action of debt on the happening of either of them; for the putting in, that he shall pay at the one or the other, must be taken to have been inserted for the benefit of the obligee; and the rather, because

Vide title *Electio*. (h) As in debt on an obligation, that if a ship put to sea,

and either the goods or the obligor came safe, he should pay such a sum over and above the use allowed by the statute; although the obligor dies, yet an action of debt lies against his executor on the happening of the other contingency; for the law supplies the words, *which should first happen*. Lev. 54. Sayer and Gleaner.

(C) Who may bring Debt: And herein of the Privy of Contract and Estate.

Wid. head of Rent.

11 H. 6. 15.

19 H. 6. 41.

b. Co. Lit.

162. a.

(a) But if a woman had

been endowed of a rent,

or a rent had been granted for life, and the tenant had attorned; and after rent had been arrear, and then the particular estate in the rent had determined by death, the executors of the tenant in dower, or of the grantee for life, should have had debt by the common law; because by possibility the testator might have had debt; as, if he had surrendered his estate to the reversioner, he should have had debt for the arrears incurred before; and these particular estates, with the attornment of the tenant, or when the law supplies an attornment, amount to a real contract in law; which realty, when the freehold is determined, resolves itself to the personality. 4 Co 49. a. b. Keilw. 47. Executor may bring debt for the arrears of annuity due to his testator upon the deed.

11 H. 6. 15.

Roll. Abr.

536.

4 Co. 49. S. P.

Noy, 43. S. P. adjudged; and said, that in such action, feisin of the services need not be alleged; otherwise, where the party himself avows. Dalt. 17. Because it is now become as a flower fallen from the stock, and they have no other remedy. Co. Lit. 162. b. S. P. For it is no rent, but a casual improvement. (b) Debt will lie for an administratrix for a fine of a copyholder; and *per Holt*, Ch. Just., it is the proper action; but three judges held, that an *assumpsit* likewise will lie. Carth. 90, 91. 3 Mod. 239. Show. 35. 3 Lev. 262. [Evelyn v. Chichester, 3 Burr. 1717. *acc.*]

(c) Intended of tenants

pur auter

vie, so long

as *cessui que*

vie lived.

Co. Lit.

162. a.

(d) Reserved

upon a lease

for life, or

gift in tail

within the

act. Co.

Lit. 162.

(e) Extends

not to a

quit-rent if

issuing out of

a copyhold.

Yelv. 135.

But *vide*

Carth. 91.

where, by

And now by 32 H. 8. cap. 37., reciting, "For as much as by the common law, executors or administrators of tenants in fee-simple, tail, or for (c) life, of rents (d) service, charge and feck, and fee-farms, had no remedy to recover such arrears as were due to their testators in their life; it is enacted, That the executors and administrators of such person to whom (e) such rent or fee-farm shall be due, and not paid at his death, may have debt for such (f) arrearages against the (g) tenant or tenants that ought to have paid the said rents or fee-farms, so being behind in the life of their testator, or against the executors or administrators of the said tenants; and further, that it shall be lawful for such executor or administrator of such person, to whom (h) such rent or fee-farm shall be due, and not paid at his death, to distrain for the (i) arrears, and all such rents and fee-farms upon the lands, &c. charged with the payment of such rent or fee-farms, and chargeable to the distresses of the testator, so long as the said lands, &c. continue in the feisin or possession of the tenant in demesne, who ought to have paid

" the

" the said rent or fee-farm so behind to the testator in his life, Eyre, Just.
 " or in the seisin or possession of any other claiming (*k*) only (*l*) this is
 " by (*m*) and (*n*) from the same tenant (*o*) by purchase, gift, or doubted.
 " descent, (*p*) in like manner as their testator might or ought in (*f*) Whe-
 " his life, and shall make avowry upon the matter aforesaid." ther money,
 &c., or other

profit to be delivered or yielded, whether annual, or second, third, &c. year, but work days, or other corporal service, is not within the act. Co. Lit. 162. (g) Whether the lessor, lessee, or occupier. Lit. Rep. 93. The tenant is not charged, but he is under a necessity to pay it, to save the distress. Allen, 62. (b) This extends not to the grantee of a rent-charge for years, if he lives so long. Cro. Car. 171. adjudged; for the statute hath provided only where the testator dies seised of a rent in fee, or for life, and the executors have no remedy, *vide* 2 Sid. 62. (i) But it extends not to the arrears of a *nomine pænæ*, relief, aid *pur fair fitez chevalier* or *file mairrier*. Co. Lit. 162. b. (k) Of *cessue que use* of a tenement, though he claims not only by the feoffor, but by the statute also. 4 Co. 50. b. — So, if the tenant makes a gift in tail, and the donee dies, a distress may be taken upon the possession of the issue in tail, though he claims *per formam dom.* as well as by descent. 4 Co. 53. b. 2 Leon. 153. 3 Leon. 59, 60. (l) The tenant leases for life, the remainder in fee, and the tenant for life pays not his rent to the lord, and the lord dies, and the tenant for life dies, the executors of the lord cannot distrain upon him in remainder, for he claims not by or from the tenant for life. Co. Lit. 162. b. 5 Co. 118. a. — So, in case of a reversion. Co. Lit. 162. (m) And not paramount, as the lord by escheat. Co. Lit. 162. Leon. 303. Or one that is remitted to an ancient title. 4 Co. 50. b. (n) The feoffee, and lessee of the feoffee, &c. *in infinitum*, are within the act. 4 Co. 50. a. b. Leon. 303. 2 Leon. 153. (o) But tenant in dower, or by the curtesy, shall not be charged, for they claim not by the party only, but by law also; Leon. 303. *per Curiam*. 3 Leon. 263. *per Curiam*. (p) So, that if after rent is arrear, the lord grants away his seignior, his executors shall have no remedy, for the act gives none, where the testator had none at his death.

And by the same act, " If one, in right of his wife, hath any (q) Extends
 " estate in fee-simple, tail, or for life, in rents, or fee-farms, to such as
 " which shall be unpaid in the wife's life, after the death of his incurred be-
 " wife, his executors and administrators shall have debt for the fore mar-
 " (q) arrears against the tenant of the demesne that ought to riage: for
 " have paid the same, his executors or administrators, and he as to those
 " may distrain for the arrears in like manner as he might have incurred
 " done if his wife had been then living, and avow upon the during mar-
 " matter aforesaid." riage, he
 might have
 had debt by
 the com-

common law. 4 Co. 51. a. b. Co. Lit. 162. b. Co. Ent. 119. Bendl 263. Kelw. 214.

And by the same act, " If one hath rents or fee-farms for the life (r) But if
 " of another, which shall be unpaid, and *cessue que vie* dies, after upon a judg-
 " his death, such person, his executors or administrators, may ment against
 " have debt against the tenant in demesne that ought to have paid tenant for
 " it when first due, his executors or administrators; and also life of a
 " (r) distrain for the same arrears upon such lands, &c. (s) out of rent-charge,
 " which payable, in such manner as he ought or might if *cessue* a moiety
 " *que vie* had been living." thereof is
 extended
 upon an
elegit, and

after rent being arrear, the tenant for life dies, the tenant by *elegit* cannot distrain for the arrears by this act; for coming in by an act of parliament, he is in the *post*. Pool and Neal, 2 Sid. 28. 62. adjudged. (s) If a rent be granted to *A.* for the life of *B.*, and after the land out of which, &c., is let to *C.* for life, the remainder to *D.* in fee; and rent being in arrear, *B.* dies, and after *C.* dies, *A.* may distrain upon *D.* in remainder for all the arrears. Co. Lit. 162. b. Edrich's case. 5 Co. 118. adjudged, *vide* Moor, 625. pl. 858. Cro. Eliz. 805. S. C. Debt is given in lieu of the distress.

If a man leases for years, rendering rent, and after devises the Roll. Abr.
 rent to another, and dies, the devisee may have an action of debt 598.
 for the rent, though it is become a rent-sock, because by the ori-
 ginal creation thereof debt lay.

So, if the lessor grants over the rent, and the lessee attorns, Leon. 315.
 for the attornment creates a privity; and there is no case where 2 Leon. 1.
 a thing *vide* Dyer,

140. Cro. a thing may be transferred or assigned over, but the remedy
 Eliz. 895. shall go along with it; and the law (a) favours remedies for
 (a) Husband rents.
 possessed of

a term in right of his wife, makes a lease for half the term, and dies, his executors shall have debt for the rent, and yet the feme shall have the reversion. Co. Lit. 46.—Rent granted for life, tenant dies, debt will lie, because there is no other remedy. Dyer, 227.

Cro. Eliz. If a man grants an annuity for years, an action of debt may
 268. ad- be brought for the arrears during the years, for being a grant for
 judged. years, it is by the deed as a contract.

Bull. 151. said to be adjudged. Yelv. 208. and Bull. 151. Lucas and Fulwood, S. P. seems to be admitted; but the plaintiff could not recover, because his claim was of debt, and his count of annuity; but *vide* Dyer, 140. Cro. Eliz. 3. 9 fl. 7. 17. cited in 7 Co. Lillington's case, 45 E. 3. 8.

4 Co. 49. 2. If the father grants a rent-charge to the son in fee, and the rent being arrear, the father dies, and the land descends to the son, by which the rent is extinct, the son may charge the executors of the father in an action of debt for the arrearages incurred in the life of the father; for though no action lies for them, as for the arrearages of a rent, [yet for the arrears of an annuity it is maintainable; and though by the descent of the land to the grantee, being heir to the grantor, as well the annuity as the rent was determined, and the original election was annexed to an inheritance, yet inasmuch as the inheritance of both was determined by act of law, (which will do no wrong to any) his election shall remain as to the arrears.]

Hawk. Abr. [By stat. 8 Ann. c. 14., an action of debt is given for the recovery of rents upon leases for a life or lives *during their continuance*, which the common law denied: on which statute Mr. Serj. Hawkins queries, whether it doth not extend to leases of incorporeal hereditaments?

Co. Lit. 73. By stat. 5 Geo. 3. c. 17. § 3., which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for the recovery of rent on such leases.]

(D) Against whom it may be brought.

10 H. 6. 11. If a feme, lessee for life, takes husband, and dies, debt lies
 26 E. 3. 64. against the husband for (b) rent issuing out of the land, in-
 Roll. Abr. 592. curred during coverture; for he took the profits out of which the
 (b) Also it rent issued.

lies against him or his executors, for the arrears of a rent-charge incurred during such time as he took the profits. 4 Co. 49. b.

3 Co. 22. If lessee for years assigns all his interest to another, yet the
 Walker's lessor may have debt against the (c) lessee for the arrears incurred
 case. Moor, after the assignment, for the privity of contract remains, and the
 351. pl. 472. lessee by his own act shall not prevent the remedy of the lessor
 S. C. ad- against him upon his contract.
 judged. Cro. Eliz. 556.

S. C. cited, 715. S. C. cited, and denied by three judges to be law. Sid. 266. S. C. cited, and agreed to be law, though several of the cases there put, as there reported, were denied to be law. Latch. 260. S. C. cited, and said it was not adjudged, as appears by the book of entries. *Vide* Cook, 122. Poph. 120. seems to be the S. C. cited, & *vide* Dalf. 16. (c) Or assignee, at his election. 4 Leon. 17. 3 Co. 24. But

— But if he once accepts the rent from the assignee, he shall not after charge the lessee for rent due after the assignment. 3 Co. 24. b. Marrow and Turpin. Moor 600. pl. 829. 2 And. 133. & *vide* Sid. 402. — For in the acceptance of the rent from the assignee, notice of the assignment is implied. March and Brace, Cro. Jac. 334. adjudged, 2 Bullst. 152. adjudged, & *vide* Roll. Rep. 366. — But though he refuses to accept the assignee as his tenant, yet he may after charge him in an action for the rent, if he pleases. Devereux and Barlow, 2 Saund. 181. — Where covenant, against the lessee, after assignment of his term, brought upon an express covenant for non payment of rent, and held good, and that the accepting the assignee as tenant did not hurt. Edwards and Morgan, 3 Lev. 233. Carth. 178.

But if after such assignment of the lessee the lessor grants over his reversion to another, the grantee shall not have debt against the lessee, for the privity of contract holds only between the lessor and lessee.

S. C. Cro. Eliz. 556. cited. Moor, 351. cited; but *vide* Cro. Eliz. 636., and 3 Lev. 233.

If *A.* leases three acres to *B.* rendering rent, and *B.* assigns all his estate in one acre, and after *A.* grants the reversion of three acres to *C.*, he may have debt against (*a*) *B.* for the whole rent, for the entire estate remaining in part, the entire privity and action for the whole remains against the first lessee.

Jac. 411. said the lessor in such case may have a joint action against the lessee and assignee. — For arrears of a rent-charge for life, after determination thereof, debt lies not against him alone that received the profits of part of the land charged, but against all that received the profits of any part thereof. Sand. 284.

If lessee for years assign his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent; for the assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor, if he pleases, with the moiety of the rent.

If a prebendary leases for years rendering rent, and this is confirmed by dean and chapter, and the lessee dies, and his executor (*c*) assigns over the term, and after the prebendary resigns, and a new prebendary is made, he shall not have debt against the executor of the first lessee for the rent due after the assignment; for the successor was no party to the contract, but privity in law only, (*d*) and by the assignment of the term, the cause of the charge is removed. Adjudged between (*e*) *Overton* and *Syddal*, Cro. Eliz. 555.

adjudged *per totam curiam*. 2 And. 133. adjudged. Larch. 260. cited, and said no judgment was ever given, as appears by the roll; but *Q.* Vent. 210. cited, and said that the acceptance of rent from the assignee was pleaded, &c. 3 Mod. 326. cited, and said the late resolutions had been contrary. 4 Mod. 75. cited, and denied to be law; for the executor shall be still liable to the contracts of his testator, so long as he hath any assets to satisfy them. (*c*) By the report of the case in Popham the lessee assigned. (*d*) That the executor is liable notwithstanding, Ironmonger and Nufam, Noy, 97. Latch 261. 2 Vent. 259. cited to have been so resolved. Helyar and Cashford, Sid. 240. 266. adjudged. Lev. 127. adjudged. But by this report the action was brought against an administrator. (*e*) Poph. 120. S. C. and the court divided. Goult. 120. adjudged by three judges *cont.* Popham, who held the contrary, and that the successor was privity to the contract of the predecessor. 3 Co. 24. a. S. C. cited to have been adjudged by Popham, C. J. and all the court, whether the assignment were by the lessee himself or his executor; yet *vide* the report of the case in the books before. Sid. 266. S. C. cited from 3 Co. 24. and denied to be law, as there cited. Lev. 127. S. C. cited to have been adjudged, because the privity of contract did not go to the successor more than to the heir, and the heir of the lessor shall not have debt against the lessee after assignment, because the privity of estate only descended to him. Latch. 262. S. C. cited, and said that the lessor being a sole corporation, the privity of contract was determined.

Lev. 215. If the assignee of a term assigns to another, yet he may be charged
 Keighly and in debt for rent growing due after, before notice given to the re-
 Bulkley, versioner; but *Q.*
 adjudged by
 Keeling and Windham, *cont.* Twisden. Sid. 338. S. C. Raym. 162. 2 Keb. 260. S. C.

Carth. 177. For where covenant was brought for rent against the assignee of
 Tovey and the executrix of the lessee, who pleaded that before any rent ar-
 Picher, rear he assigned over to J. S., on demurrer it was holden, that
 held by the privity was destroyed, and the assignment complete without
 Pollexfen notice, and the defendant discharged of all the rent accrued after
 and Rokeby the assignment.
 in C. B. *cont.* Powel
 and Ventris, that the defendant ought in his plea to have set forth notice given to the plaintiff of the
 assignment; and Ventris dying the judgment was accordingly; but upon a writ of error in B. R. the judg-
 ment was reversed by three judges. 3 Lev. 295. S. C. Show. 340. S. C. 4 Mod. 71. S. C. 2 Vent.
 228. 234. S. C. Salk. 81. pl. 2. 12 Mod. 23. S. C. [1 Ld. Raym. 368. S. C. cited. *Vide supra*
 72, 73.]

(E) Where Debt is the proper Action, and not Covenant, Case, &c.

4 Co. 92. b. A CTIONS of debt are founded on contract, in which the plain-
 Slade's case. tiff sets forth his demand in certainty, and insists on being
 restored to it *in numero*.

Vaugh. 101. The inconveniency of the defendant's being allowed to wage
 his law in this action occasioned the substituting of other actions
 in the room of it; such as all actions on the case, which are
 properly founded on injuries and fraud, for in these the defend-
 ant could not wage his law, because he could not make oath of
 paying that which by reason of its uncertainty he could not
 know; and which could never be before it was ascertained by
 the jury.

4 Co. 92. b. Hence if *A.* declares that he sold corn, &c. to *B.* and that *B.*
 Slade's case. at or before such a day promised to pay so much money, *A.* may
 Moor, 433. at his (*a*) election bring debt or *assumpsit* for the injury done by
 S. C. Yelv. the violation of the contract.
 20. S. C. *Vide the*

Register 95. 139. (*a*) If I deliver 20 *l.* to *A.*, to deliver to *B.*, and he does not deliver it, I may have
 an action of account, debt, or perhaps case, against him. Keliw. 69. a. 77 b. Cro. Jac. 637. Dyer,
 21. Hut. 12 — *A.* delivers oxen to *B.*, to sell for as much as he can get, and he sells them for so
 much, *A.* may have debt against *B.* for the money. Roll. Rep. adjudged — *A.* delivers money to
B., to re deliver, debt lies for it. Palmer, 364. — The defendant by bill sealed, acknowledged that
 he had received 7 *l.* of the plaintiff *ad emendum* a pair of bellows. Cro. Eliz. 644: adjudged, that ac-
 count or debt lay. *Vide* 3 Leon. 38. Roll. Abr. 597. Dan. 26. 2 Ld. Raym. 814. 2 Salk. 658.
 pl. 3. 7 Mod. 87.

Palm. 364. *A.* pays money to *B.* as a fine, upon *B.*'s promise to make a
 lease of land, and before the lease is made *B.* is evicted, debt lies
 not for the money, for it was not paid to be received back; but
 case lies for non-performance of the bargain, in which he shall
 recover in damages not only the money given for the fine, but
 the damage by breach of the contract.

Styl. 31. If *A.* covenants with *B.* to pay him (*b*) so much money as he
 133. S. P. shall expend in the repairing and victualling of a ship for him, and
 (b) 2 Jon. *B.* expends

B. expends 300*l.* accordingly, an action of debt or covenant lies for the money expended. 184. Like point adjudged, though the certainty of the debt did not appear by the deed.

If it be recited by deed, that there is a suit depending between the vicar of *S.* and *A.* concerning a *modus decimandi*, which concerns all the parishioners of *S.*, and *B.* a parishioner, by the said deed agree and promise *A.* to pay his proportionable part of the charges of the suit; an action of debt or covenant lies upon this deed; for by an averment of what was expended in the suit, that which was at first uncertain may be reduced to a certainty (*a*). 3 Lev. 429. Sanders and Mark, adjudged after a long debate. [(a) That, debt will lie for an indeterminate

sum, capable of being readily reduced to a certainty, hath been established by other cases. Bloome v. Wilson, Sir T. Jones, 184. Birtch v. Weaver, 2 Keb. 225. fo. 80. Rands v. Peck, Cro. Ja. 618. Nor is it now understood to be necessary that the plaintiff should recover the full sum demanded. Aylett v. Lowe, 2 Bl. Rep. 1221. Walker v. Witter, Dougl. 6. Rudder v. Price, 1 H. Bl. 550. And a declaration in debt upon a simple contract hath been holden good, though it specified by the several counts a less sum than appeared to be demanded in the recital of the writ, and yet assigned as a breach the non-payment of the sum demanded in the writ. McQuillin v. Cox, 1 H. Bl. 249.]

If *A.* retains *B.* to embroider a fatten gown of a maid servant of the daughter of *A.* taking for the same 40*s.*, *B.* may have debt against *A.* for the money; for the embroidering the gown of another at the request of *A.* is a sufficient consideration to charge *A.*, and it is at the election of *B.* to bring debt, or an *assumpsit*. Cro. Eliz. 880.

(F) Of the Manner of bringing the Action; and where it must be brought in the *Debet* and *Detinet*.

IF the action be brought for (*b*) money, it must be in the *debet* and *detinet*; but if (*c*) goods or chattels, it must be in the *detinet* only. (b) 50 E. 3. 16. b. Roll. Abr. 604. S. P.

(*c*) 3 Leon. 260. 4 Leon. 46. S. P. Winch, 75. It was brought for money in the *debet* and *detinet*, and for two shirts in the *detinet* only* — * *Sed qu.* If the declaration was good, as it seems to be two distinct species of action, and requires two different pleas?

So, if brought for foreign money (*d*) not made current, for then it is as bullion. Palm. 407. Latch. 77. 84. Jon. 69.

S. C. adjudged, where by Dod. the action might be brought in the *debet* and *detinet*, or in the *detinet* only; but this must be intended where so much English money, being the value of the foreign, is demanded. Rastal and Draper, Cro. Jac. 88. Yelv. 80. Brownl. 90. Noy, 13. & vide Leon. 41. Yelv. 135. Brownl. 102. (*d*) But if made current by proclamation, the action for it may be brought in the *debet* and *detinet*. Noy, 13. Latch, 77. 84. Palm. 407.—Debt in the *debet* and *detinet* for 107*l.* 10*s.* where the declaration was upon a special wager for 100 guineas, which the plaintiff averred were worth 107*l.* 10*s.*, and it was objected that it should have been in the *detinet* only, for 100 guineas in specie, but held well enough as to this point, though reversed for another fault. St. Leger and Pope, Carth. 322. 5 Mod. 4. 4 Mod. 406. Lutw. 484. Salk. 344. S. C. pl. 1. 10 Mod. 336. 12 Mod. 81. S. C.

If a man sells certain cloths for 66*l.* *Flemish* money current at *Middleburgh*, to be paid upon request, he may bring an action of debt for 39*l.* 12*s.*, setting forth the special matter, and averring that the 66*l.* *Flemish tempore venditionis*, &c. amounted to 39*l.* 12*s.* *moneta Angliæ*, and that the defendant has not paid, &c. and if he values the foreign money otherwise than in truth it is, the defendant Cro. Jac. 88. Rastal and Draper, adjudged. Yelv. 80. Brownl. 90. Moor, 775. S. C.

Leon. 41.
Cro. Eliz.
536. S. P.
adjudged,
& vide
Yelv. 135.

Brownl. 102. (c) But in debt against an executor for 47 l. 8 s. 8 d. *monetæ Flandriæ attingent, ad valentiam* 0 l. English, the defendant pleaded *plene administravit*, and it was found against him, and judgment given *quod recuperet debitum*; but upon a writ of error between Bagshaw and Plain, Cro. Eliz. 536., it was reversed, because it should have been *quod recuperet* the 47 l. 8 s. 8 d. Flemish, and a writ to have been awarded to inquire the value. Moor, 704. pl. 980. reversed, because the jury had not inquired of the value of the Flemish money, and the affirmation of the plaintiff that it amounted to 40 l. was not a sufficient warrant for the court to give judgment upon.

Moor, 566. If an executor brings debt for any thing in right of his testator, Roll. Abr. 603, 603. it must be in the *detinet* only.
20 H. 6. 5. 5 Co. 32. b. S. P. laid down as a rule.

Roll. Abr. 602. Lane, 79. S. C. adjudged. As if *A.* be in execution upon a judgment for *B.*, and after *B.* die, and after, *A.* bring an *audita querela* against *C.* the executor of *B.* and have a *scire facias*, and thereupon put in bail by recognizance in Chancery, according to the statute of 11 H. 6. c. 10: (b) So, if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape, &c. for the first action being in the *detinet*, and that for the escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326. Cro. Jac. 545. 685. Hob. 264. 2 Roll. Rep. 132. Styl. 232. Hut. 79. S. P. adjudged, in which last book it was endeavoured to distinguish it from the other cases, because the plaintiff declared generally, and not as executor.

Roll. Abr. 603. Lane, 80. S. P. So, if an executor recovers in an action of debt upon a contract, and afterwards brings debt upon the judgment, it must be in the *detinet*.

20 H. 6. 5. b. Roll. Abr. 602. S. C. If an executor brings debt upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the *detinet* only, for he brings the action as executor.

20 H. 6. 6. b. Roll. Abr. 602. So, if a man binds himself to the testator to pay him 100 l. when such a thing shall happen; if it happens after the death of the testator, yet the writ of debt by the executor shall be in the *detinet* only.

11 H. 6. 36. Roll. Abr. 602. S. C. If a rent be granted to another for years, the executor of the grantee shall have debt for the arrearages of this rent incurred after the death of the testator in the *detinet* only, for he had it as executor.

Roll. Abr. 603. Spark and Spark, Cro. Eliz. and Noy, 32. S. C. So, if lessee for 20 years leases for 10 years rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator (c) in the *detinet* only.

adjudged. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged. (c) But in the case of Trattle and King, 2 Jon. 169. it is adjudged, it lay in the *debet* and *detinet*, and a diversity taken between

tween things in action and chattels in possession; for as to things in action the writ must always be in the *detinet*; as for the arrears of an account, &c. and it shall not be assêts till recovered; but in this case, the reversion of the term being in the executor immediately by the death of the testator, it is assêts, for the whole value, and the shewing he is executor, is only to entitle him to the term to which the rent is incident. — And where being brought in the *debet* and *detinet* it is aided after verdict, by 10 & 17 Car. 2. c. 8. *vide* Lev. 250.

If in an account an executor recovers a debt due to his testator, in debt for the arrearages thereupon, the writ shall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator.

vide Hob. 83. 184. 272. Noy, 19. 2 Lev. 111. 2 Jon. 47.

But if an executor takes an obligation for a debt due to his testator by contract, in debt upon this obligation the writ shall be in the *debet* and *detinet*.

So, if an executor recovers in trespass for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*, for he need not name himself executor.

So, if the executor sells the goods of the testator for a certain sum, he shall have debt for this in the *debet* and *detinet*.

If an executor, having lands by an extent upon a statute made to the testator, and naming himself executor, by deed leases them for three years, rendering rent, &c., if an action of debt is after brought by him for this rent, it must be in the *debet* and *detinet*, because it is founded upon his own contract.

So, an executor, being lessee for years of a rectory in the right of the testator, may have debt upon 2 & 3 E. 6. c. 13. for not setting out tithes in the *debet* and *detinet*, because founded upon a wrong in his own time, and by the statute it is given to the party grieved.

Also, debt against an executor shall be in the *detinet* only, for he is chargeable no farther than he has assêts.

But after (a) judgment against an executor, one may in a new action of debt in the *debet* and *detinet* suggest a *devastavit* by the executor, and (b) thereby charge him *de bonis propriis*.
(a) But not without a judgment. Cart. 2. — And therefore it lies not upon a bond suggesting such a *devastavit*, for it is hard upon such a surmise to charge an executor in his own right. Vent. 321. adjudged, and the court said they would not extend these actions farther than they had been. 2 Lev. 200. adjudged. Lev. 147., and for this *vide* Roll. Abr. 603. 5 Co. 32. Sand. 216. (b) Where the defendant has been held to special bail in such action. Vent. 355. Sid. 63.

So, if the executor obliges himself to pay a debt due by contract by the testator, in debt upon this obligation the writ may be in the *debet* and *detinet*, because the obligation made it his own debt.

In an action of debt against an executor for rent, incurred in the life of the testator, the writ shall be in the (c) *detinet* only.
debt be brought against an administrator in the *debet* and *detinet* for rent due before his time, where it should only be in the *detinet*, this is aided after verdict, by 16 & 17 Car. 2. c. 8. *vide* Sid. 379. Potter's case, and tit. *Error*.

Roll. Abr. 603. Cro. Eliz. 711. Moor, 556. Brownl. 56. Cro. Jac. 411. 546. But if an action of debt be brought against an executor for the arrears of a rent, reserved upon a lease for years, and (a) incurred after the death of the testator, the writ (b) shall be in the *debet* and *detinet*, (c) because the executor is charged of his own possession.

Bollt. 23. 2 Brownl. 206. Cro. Car. 225. All. 34. Mod. 185. 2 Brownl. 202. Palm. 116. S. P. (a) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. All. 76. Styl. 118. (b) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Royston and Cordary. All. 42. adjudged, and said that it was never doubted. Styl. 79. adjudged, & vide Styl. 52. Lev. 127.* (c) For though he hath the land as executor, yet nothing shall be employed to the execution of the will but such profits only as are above that which is to make the rent; and therefore so much of the profits as is to make or answer the rent he shall take to his own use, and he shall be charged for it in the *debt* and *detinet*. Poph. 120. per Popham. 5 Co. 31. Cro. Eliz. 712. [but see Cro. Car. 225.] — And if the land be not worth more than the rent, it is a good plea to such action in the *debt* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171. per cur.; and for this vide Palm. 118., Sid. 266., Mod. 185. — But where he is to be charged upon a lease made to the testator, and hath not the profits of the lease to answer it, he ought to be charged in the *detinet* only; as where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120. Sid. 266. Lev. 127. 2 Vent. 209. 3 Mod. 327. So, if brought against him after waiver of the term. Lev. 127. & vide Allen, 43. [2. Whether an executor can waive a term? 1 Mod. 185.]

* But where part incurs in the life of testator, and part after, the plaintiff may bring two actions, for the first part in the *detinet* only, the other in the *debt* and *detinet*, and need not charge him as executor, in the last case, by which means he may obtain a judgment *de bonis propriis*.

5 Co. 36. a. Lloyd and Walcot. 3 Leon. 206. S. C. adjudged. Allen, 71. S. P. If an action of debt is brought against baron and feme, upon an obligation entered into by the feme before marriage, it shall be in the *debt* and *detinet*; for by the marriage all the personal goods and power of disposing of the real are by law given the husband, which he has to his own use, and not as executors, who have them only to the use of another.

5 Co. 36. a. (d) And for another reason, because he is bound by special words in the obligation. Cro. Eliz. 712. & vide Cro. Eliz. 350. 2 Leon. 11. 2 Brownl. 204, 205. — But if in the *detinet* only, it is good after verdict, by 16 & 17 Car. 2. c. 8. Comber and Watton, Lev. 224. adjudged. Sid. 342. 375. 379.

(G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

Id. head of Pleas and Pleadings. 13 H. 4. 1. Roll. Abr. 604. Burr. Rep. 9. If a man accepts an (e) obligation for a debt due by simple contract, this extinguishes the contract, but the acceptance of an obligation for a debt due by another obligation is (f) no bar of the first obligation.

(e) This must be intended from the debtor; for if a stranger gives bond for such debt, it is none. 2 Leon. 110. adjudged †. — So, if upon the making the contract, a stranger gives bond for it, or being present promises to give bond for it, and after does so, the debt by contract is extinguished, the obligation being made upon or pursuant to the contract. 2 Leon. 110. per cur. — So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court, for by the deed the legacy is extinct, and it is become a mere debt at common law. Yelv. 38. (f) For one deed cannot determine the duty upon another. Cro. Eliz. 304. 727. for this vide 2 Dan. 116. — So, if a statute is accepted for it. Roll. Abr. 470. — Otherwise, if a judgment is given or obtained upon the obligation. 6 Co. 44, 45.

† So, a negotiable note, or bill of exchange, has been held in B. R. an extinguishment of a simple contract debt, the defendant being liable to pay the money to a third person. — Richardson and Rickman, M. 1775. [I vide *supr.* vol. 1. 281-2.]

In

In debt upon an obligation the defendant cannot plead *nil debet*, *Vide Hard.* but must deny the deed by pleading *non est factum*, for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. 332. of Pleas in Bar, head of Pleas and Pleadings.

But if the debt be due by simple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing. Hob. 218. 2 Inst. 651.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never (a) entered; also, by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. [The indenture is only inducement to the action; matter of fact is the foundation of it.] Hard. 332. (a) But if the lease be by indenture, debt lies, though he never entered. 2 H. 8. 14. Roll. Abr. 605.

2 Ld. Raym. 1477. 2 Stra. 763.—And therefore, in a declaration in debt for rent against such lessee, it need not be shewn that he entered, for the contract is the ground of the action. 4 Leon. 18. Hetl. 54. Vent. 41.—And the occupation not material; otherwise, of a lease at will. Dyer, 14. a. Hetl. 54. Vent. 41. 108. Salk. 209. pl. 1. S. P. for it must appear to the court when he entered, and how long he occupied; *secus*, of a lessee for years. Ld. Raym. 170.—Where upon a lease from year to year *quandiu partibus placuerit*, no entry or continuance of the possession was shewn as to the second year, and yet after verdict it was intended he was in possession for all the time for which the rent was found due. 5 Salk. 136. pl. 3. Mod. 3. Sid. 423. & vide Plow. 423. Palm. 117. 2 Roll. Rep. 131. Keilw. 65.

[So, in debt for an escape (b), or on a *devastavit* (c) against an executor, *nil debet* is a good plea; for the judgment is but inducement, and the escape and *devastavit* are the foundation of the action.] (b) Waites v. Briggs, 2 Salk. 565. (c) Wheatley v. Lane, 1 Saund. 219.

In debt for the arrears of an (d) annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. Keilw. 147. (d) But in debt upon the grant of a rent, *nil detinet* is a good plea, because the

plaintiff hath other remedy to levy it, viz. by distress; otherwise, upon the grant of a bare annuity, for there being no remedy by distress, the grant must be avoided by matter of as high a nature, viz. by acquittance. Hard. 333.

[So, in debt for a penalty upon articles of agreement, or on a bailbond, *nil debet* is no plea, for in these cases the deed is the foundation, and the fact but inducement.] Warren v. Confort, 2 Ld. Raym. 1500. 2 Str.

778. S. C. 1 Barnard. 15. S. C. 3 Mod. 106. 323. 382. S. C. Fortesc. 363. 367.

But in debt for the arrears of a rent-charge, devised to the plaintiff's wife for life, against the (e) administrator of the occupier of the land, *nil detinet* is a good plea, for a will is no deed, nor wants any delivery: adjudged, and said the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing out thereof. Hard. 322. Wilson's case. (e) That where the testator could not plead *nil debet*, his executor shall not plead *non detinet*. 2 Mod. 266.

In debt upon 2 & 3 E. 6. c. 13. for not setting forth tithes (f), not guilty, or (g) *nil debet* are good issues. 2 Inst. 651. Cro. Eliz. 621. S. P.

adjudged. (f) Where the action is founded upon a penal statute, not guilty is a good plea. Cro. Eliz. 217. Goulst. 59. Noy, 56. 2 Inst. 651. Moor, 914. pl. 1293. [See 1 Term Rep. 462.] (g) Hob. 218. S. P. adjudged. 2 H. 8. 14. Roll. Abr. 605.

Moor, 49. In debt upon a contract, the defendant cannot plead the contract
(a) Or plead was for a less sum, or otherways, than the plaintiff has declared,
nil debet *. and traverse the contract in the declaration laid, but may (a) wage
Keilw. 37. his law.
Cro. Eliz. 880.
Palm. 223. The contract being but the conveyance to the action, is not traversable. Co. Lit. 295.
But for this side head of *Pleas and Pleadings*. — * The plea of *nil debet*, in such case, puts the whole matter in issue.

1 Ld. Raym. 566. [Under the plea of *nil debet*, the defendant may give in evidence
12 Mod. 376. a release, or other matter, in discharge of the action.
S. C. 1 Ld. Raym. 594. S. P. Gilb. Debt, 434. 443. Semb. *contr.*

Draper v. And it has been holden, that as this plea is in the present
Glasfop, tenfe, the statute of limitations may be given in evidence un-
1 Ld. Raym. der it.
153. Anon.
1 Salk. 278. S. P.

Bredon v. But in debt *qui tam*, the defendant was not allowed to give in
Harman, evidence on *nil debet*, a former recovery against him by another
1 Str. 701. person for the same cause.]

Deodand.

3 Inst. 57, **A** Deodand is that instrument which occasions the death of a
58. man, and is forfeited to the king in order to be disposed of in
5 Co. 110. pious uses by the king's almoner. This forfeiture of whatever
H. P. C. 34. procures the death of a man without the default of another was
Pult. 125. (b) introduced to increase the terror and abhorrence of murder, so
Crom. 31. a. that nothing that occasioned it should seem to go unpunished.
(b) And Also that weapon or instrument, whereby one man kills another,
was possibly taken from the law of *Mose*, is called a deodand.
Mose, which requires that the beast that murders should be slain. 2 Exod. 28.

Hawk. P. C. To understand what things are forfeited as deodands, we must
c. 27. observe that it is laid down as a rule, that *omnia que movent ad mortem sunt deodanda*, and, therefore, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also.

Salk. 220. As, where a cart meeting a waggon loaded upon the road, and
The Lord of the Manor of Ham- the cart endeavouring to pass by the waggon, was driven upon a
stead's case, high bank and overturned, and threw the person that was in the cart just before the wheels of the waggon, and the waggon run
over

over him and killed him; it was holden, that the cart, waggon, loading, and all the horses were deodands, because they all moved *ad mortem*. by Pollexfen and Gregory, on the Home Circuit.

But if a man, riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon only are forfeited, but not the loading, because it no way contributed to his death. 3 Inst. 58. S. P. C. 20. Hawk. P. C. c. 27.

So, where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited; as where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited, but if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater.

Also, if a man riding on a horse over a river is drowned (a) through the violence of the stream, the horse is not forfeited, because not that, but the waters caused his death. Cro. Jac. 483. 2 Roll. Rep. 23. Poeh. 136. Salk. 220.

(a) *Secus*, if the horse had thrown him, Salk. 220.

By the opinion of our (b) antient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a steeple, &c. may be deodands; but by the (c) latter resolutions they cannot, unless they were severed before the accident happened. (b) S. P. C. 20. b. Fult. 124. b. (c) A. Sid. 204. Lev. 136.

Raym. 97. Keb. 723. 744. S. C. where a man was ringing a bell, and the rope caught him up and dashed him against the roof of the belfry, whereby he died. 6 Mod. 187. S. C. cited by Holt, and that it was no deodand. — So, of the wheel of a forge. 6 Mod. 187. See Salk. 220. Hawk. P. C. c. 26. § 5, 6, 8, &c. Stra. 61.

Also it was (d) formerly holden, that this forfeiture did not extend to casual deaths arising from the indiscretion of children or infants, within the age of discretion, for that such punishment of innocent owners by taking their goods would answer no good end of justice; besides, the misfortune in this case might seem rather owing to the indiscretion of the infant than any default in the thing: but this distinction has not been allowed of (e) late; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which it is plain that no manner of fault can be imputed. (d) S. P. C. 21. a. 3 Inst. 58. H. P. C. 33. Pult. 125. Dalt. c. 97. (e) 2 Keo. 719. 206. Hawk. P. C. c. 27.

This forfeiture takes place at land only, and doth not extend to the seas that are continually liable to storms and tempests, and therefore a ship in salt water, whether in the open sea, or within the body of a county, from which a man falls and is drowned, is not forfeited. 3 Inst. 58. H. P. C. 33. S. P. C. 20. b. Hawk. P. C. c. 27.

But a ship, by a fall from which a man is drowned in the fresh water, shall be forfeited, but not the merchandize therein, because they no way contribute to his death. H. P. C. 33. 3 Inst. 58. Hawk. P. C. c. 27.

In all these cases, if the party wounded die not of his wound within a year and a day after he received it, there shall be nothing forfeited; for the law does not look on such a wound as the cause of a man's death, after which he lives so long; but if the party die within that time, the forfeiture shall have relation to the wound S. P. C. 21. b. H. P. C. 55. Hawk. P. C. c. 27. Dalt. c. 97. Plow. 260. Keilw. 68.

given, and cannot be saved by any alienation or other act whatsoever in the mean time.

5 Co. 115. b. However, nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition the sheriff is answerable for the value of it, and may levy the same on the town where it fell; and therefore the inquest ought to find the value.

Folt. Cr. As this forfeiture seemeth to have been originally founded rather in the superstition of an age of extreme ignorance, than in the principles of sound reason and true policy; it hath not of late years met with great countenance in *Westminster-Hall* *.

Law, 266. * Upon in-
quisions, the jury find the value as small as possible.—And in some cases only the value of the identical thing moving to, or causing the death; as for example, of the wheel of a loaded waggon, &c. [This practice, the court of King's Bench have impliedly sanctioned, by refusing to reform it on an application by the crown or its grantees. Folt. 265. 2 Barnardist. 82. Nor can such inquisitions be taken by the grand jury on default of the coroner. 1 Burr. 19.; and when taken by the coroner, they may be removed and traversed. *Ibid.* 2 H. H. P. C. 416.]

Descent.

- (A) Of Lineal Descent: And herein of the Exclusion of the ascending Line.
- (B) Of Collateral Descent.
- (C) Of the Half-Blood, and the *Possessio Fratris*.
- (D) Of Descents according to Custom.
- (E) Where a Person shall be said to take by Purchase, and not by Descent.
- (F) Of a Descent, its Operation to take away an Entry.
- (G) In what Cases the Entry of the Disfeoffee may be lawful notwithstanding a Descent.
- (H) Whose Entry is preserved notwithstanding a Descent.
- (I) How the Entry may be preserved by continual Claim: And herein,

- 1. Of the Nature of continual Claim, and the Effects of it.
- 2. What is necessary to a continual Claim to make it effectual,
- 3. The Time in which it is to be made.

(A) Of Lineal Descent : And herein of the Exclusion of the ascending Line.

Anciently, the lords gave lands to such persons as had behaved themselves well in the wars, for their lives only, and sometimes they also married their daughters to them, and then they limited the lands to go not only to the tenant himself, but also to the issue of that marriage ; and this first brought in the notion of succession among the northern nations where the feudal tenures prevailed.

The lands therefore in the elder times went to the immediate descendants of such marriage, and originally to none else : and in the first place they went to the (a) males as the most worthy of blood, and most capable of doing the service annexed to such donations : and the feud was united in the (b) male, because he was obliged to do the duty in the wars, and for every knight's fee was to go out forty days with his lord, so that the feud did not divide among the males, because the duty could not be commodiously divided : besides, the males were to keep up the name and grandeur of the family ; and, therefore, the inheritance was not shared or broken. From hence it came to pass, that among the males, the eldest was preferred as the most worthy, since he was soonest able to go to the wars, and to do the (c) duties of the tenure.

lord, for the lord always approved the first marriage of his feudatory, and of his heir apparent ; and if the feudatory died, his heir within age, the lord had the total marriage of him ; and if he was of full age, the lord gave licence to such marriage. From hence the descent always settled in the eldest line, and the daughter of the eldest son was preferred before the second or third brother, and their male descendants, in order to encourage the best marriages with such eldest son. Spelm. Rem. 29.

When a feud escheated to the lords for felony, or want of heirs, the lords used to restore it to the old family, or grant it out again to another family *ut feudum antiquum*, and then the descent was formed in such new feud, as if it had been *feudum antiquum*. Hence, the lineal succession or succession of the father was totally excluded, because no case could happen where the ascending line could be admitted in *feudis antiquis* ; for the father took before the son under the first feudatory in every ancient feudal donation ; and all above such donation were excluded, so that in such donations the father could not claim as heir to his son. And this order of descent which excluded the father was the rather continued, because the father was guardian to his son ; and in those barbarous times they would not trust the father with any profit from the death of his own issue, and so the father was totally excluded.

But though the father cannot inherit his son, yet if a lease for life be made to the son, the remainder to his next of blood, the father shall take the remainder by (d) purchase under the words of designation.

the eldest dies, leaving a son, and a remainder is limited to the next of blood to the father, the younger son shall take it ; y^e. the other is the father's heir. Co. Lit. 10. b.

Gilb. Treat. of Ten. 9.
(a) Vide title *Coparceners*.
(b) Vide titles *Garvelkind* and *Borough-English*.
(c) Also, the eldest son was anciently married with the consent and approbation of the

Co. Lit. 11. b.

Co. Lit. 10. b.
(d) So, if a man hath issue two sons, and

Lit. § 3.

Co. Lit.

11. b.

(c) Therefore, in case of a reversion upon a lease for

life, made of the lands by the son, the father cannot be heir, because the son was last actually seised; otherwise, of a reversion upon a lease for years; for the possession of the tenant is the possession of the uncle. Co. Lit. 11. b.—If a son be enfeoffed with warranty, and the uncle enter into the lands after the death of the son, and die; my Lord Coke says, that the father cannot take benefit of such warranty, because it was never actually possessed by voucher, or *warrantia habita*. Co. Lit. 11. b.—If an advowson be granted to the son and his heirs, and the son die without issue, and the advowson descend to his uncle, and he die before he can or does present to the church, the father shall not inherit, for before a presentation there is no actual seisin of the advowson. The same law of a rent. Co. Lit. 11. b. (b) The evidence of seisin, or defect thereof, shews when it will or will not descend to the father from the uncle.

Eastwood v.

Vinke,

2 P. Wms.

614.

Co. Lit.

11. b.

[But if the father happen to be also cousin to the son, and as such his heir, he may, in that remoter capacity, inherit immediately after the son.]

But here we must take notice, that if, after the descent to the uncle, the father has issue a son or daughter, that issue shall enter upon the uncle, for the land descended originally upon the uncle, because he was then the next heir; therefore, if an heir nearer than he is springs up, by the same rule that he succeeded to the land at first, that heir must now take place and exclude him: and by the same rule, if a man hath issue a son and a daughter, and the son purchases lands in fee, and dies without issue, the daughter shall inherit; but if the father hath afterwards issue a son, this son shall enter into the land as heir to the brother; and if he hath issue a daughter and no son, she shall be coparcener with her sister.

(B) Of Collateral Descent.

Piow. 444

to 449.

Clerc and

Brook,

Co. Lit. 12.

(c) Co. Lit.

10. b.

*Haeres in linea recta praefertur baroni in linea transversali, & propinquior excludit propinquum, propinquus remotum, remotus re-
vultio em.*

IF a man purchased the *feudum novum ut feudum antiquum*, and died without issue, it went first to the father's side, because the lords in such feudal donations were presumed to respect the father's side, who had been the ancient tenants of the manor; for where it was given *ut feudum antiquum*, it must be presumed to be meant as if it had been an ancient feud of that manor, and therefore it went to the father's side *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were presumed rather to respect the female blood of their former tenants, than the blood of the mother who was newly introduced into the family of their feudatory, because the feud was given as an ancient one, and, by consequence, the blood of the precedent tenant was preferred to any other: but the blood of his mother's side was preferred to the blood of his grandmother; because, being both female bloods, and both coming under the consideration of ancient tenants, the (c) nearer tenant's blood was preferred to the more remote: but if the father's side wholly failed, then the blood of the

the mother was admitted, *to wit*, first the male line, and then the female of such blood, since the lord must be presumed to introduce the blood of the mother, when he had given an indefinite right of representation.

Agreeably to this scheme of descent upon the purchase of the *feudum novum ut feudum antiquum*, if a son purchase land in fee-simple, and die without issue, they of the blood of his father's side shall inherit as heirs to him before any of the blood of his mother's side, for the old rules, formerly settled for the directing of the descents of such feuds as were purchased, still prevail; and all new purchases made now of lands in fee shall be considered as the purchases formerly made of the *feudum novum ut antiquum*.

Lit. § 4.
Vide infra,
letter (E),
36.

If the son purchases land, and dies without issue, and it descends to any heir of the part of the father, and then the line of the father (after entry and possession) fail, it shall never resort to the line of the mother, though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother; for now by this descent and seisin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, because he can never shew that he was heir to him that was last actually seised; which being a rule to be strictly observed, he must entitle himself by it, otherwise be excluded.

(C) Of the Half-Blood, and the *Possessio Fratris*.

NONE shall be heir of land in fee-simple, or to a warranty, or sue an appeal of death as heir, unless he be of the (a) whole blood, *viz.* both of the father and the mother.

time the feudal donations were worn out, and then it became impossible to compute up to the first marriage, where such donations were originally settled, and therefore they changed the computation, and computed from the last possessor, provided the heir that claimed was of the blood of the first purchaser, and then the rule was taken *quod seifina facit stirpem*; for since the feudal donation was lost, they could not regularly compute the descendants from the first feudal marriage; and therefore they computed from the last feudatory; and since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudatory, that would claim as heir to him; for if any person was of the whole blood of such feudatory, then he must of necessity be of both bloods of that remote feudal marriage, where the feud was originally placed; and thus the half-blood came to be excluded; *vide Distribution*, under title *Executors and Administrators*.

Co. Lit.
14. a.
(a) In a long
course of

Therefore, if an elder brother purchases lands in fee, and dies without issue, his sister of the whole, not his younger brother of the half-blood, shall be his heir.

Co. Lit.
14. a.

So, if a man seised in (b) fee hath issue a son and a daughter by one venter, and a son by a second venter, and dies, and the eldest son (c) enters and dies, his sister shall inherit according to the rule *quod possessio fratris de feodo simplici facit sororem esse heredem*.

Co. Lit. 15.
(b) But this
rule does not
extend to
lands in tail,
for as to

them a man must claim as heir *per formam doni*. Co. Lit. 15. — So, of a remainder after an estate for life that never fell in possession, for a man must claim by virtue of the contract, as heir to him to whom the remainder was limited. 3 Co. 41. b. So, of a reversion, whether any rent were reserved, or not. 3 Co. 41. b. 42. b. (c) But without an actual seisin the younger shall have the lands as heir to his father. Co. Lit. 15. a.

Co. Lit. 15. a. 243. a. If a father makes a lease for years, and the lessee enters, and dies, the eldest son dies during the term, before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because the possession of the lessee for years, who was formerly considered only as a bailiff to the lessor, is the (a) possession of the eldest son. And see the cases of *Whitcombe v. Whitcombe*, Pr. Ch. 280. *Goodtitle v. Newman*, 3 Wils. 516. So, the entry of a devisee for years, it is said, will make a *possessio fratris*. Jenk. 242.]

Co. Lit. 15. Cro. Car. 411. Roll. Abr. 628. Jon. 361. But if a man makes a lease for life, and dies, leaving a son and a daughter by one *venter*, and a son by a second wife, and the eldest son dies before the lease for life is determined, the youngest son shall inherit, because the eldest was never seised.

N. Bendl. 145. 8 Aff. 6. So, if a father makes a lease for life, and after recovers against his lessee by default, and dies, and the eldest son enters, against whom the lessee recovers by a *quod ei deforceat*, and then the eldest son dies, the brother of the half-blood, and not the sister, shall have the reversion; for when the tenant for life has recovered his estate, he hath entirely defeated all possession in his lessor, which he acquired by the judgment on default, and all possession in the eldest son likewise by virtue of that judgment, and is entirely in of his old estate; so that there is no actual seisin left in the elder brother whereon to found a *possessio fratris*.

Co. Lit. 14. b. And so of other hereditaments, as a feignery, &c. 3 Co. 41. b. There is *possessio fratris* of an advowson or (b) rent, after actual receipt of the rent, or presentation of the clerk; so of (c) a use, because equity follows the rule of the common law; so likewise of a copyhold, where the eldest son receives the profits, and dies, though before admittance.

42. a. —Of offices, courts, liberties, franchises, and commons of inheritance. Co. Lit. 15. b. 3 Co. 42. a. (b) Co. Lit. 15. b. S. P. 3 Co. 42. a. S. P. (c) Dyer, 10. pl. 40. 274. pl. 45. Roll. Abr. 562. pl. 3. [i. e. of a use not executed by the statute; for uses executed are legal estates. Co. Lit. 14. b. note 5. 13th edit.]

(e) 1 Co. 121. b. [So, of a trust (d) and (seemingly by the better opinion) of an equity of redemption (e).] 2 P. Wms. 713. Hardr. 488. (e) 1 Atk. 604. Co. Litt. 205. a. note (1), 19th edit.

Co. Lit. 15. a. But though the eldest son enters, and gets an actual possession of the land, yet if the father's relict be endowed of the third part, and the eldest son die, the brother of the half-blood, and not the sister, shall have the reversion of the third part, because the actual seisin which the brother obtained, was defeated as to the third part, by the widow's entry into it, who is esteemed in law to be in, in continuance of her husband's estate, without any interruption.

Co. Lit. 15. a. But if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, who afterwards died, the daughter should have the reversion, and not the half-brother; for the widow's acceptance of dower from the tenant for life, and the existence of his estate in the land after her decease, shew that the tenant for life had an interest in the land; but such an interest always presupposes an actual seisin in the lessor; otherwise he could

not make that livery which is necessary on the passing of a freehold; therefore, notwithstanding the dower, this actual seisin in the brother shall establish a *possessio fratris*.

Lands are given to a man and his wife in special tail, the remainder to the heirs of the husband, and they have issue a son, and the wife dies, the husband marries again, and hath issue a son, and dies, the eldest son enters, and dies without issue; the second brother of the half-blood shall inherit the remainder, because the eldest brother was not seised of a fee-simple, as the margin is, but only of the special tail, and so no ground for a *possessio fratris* of the fee expectant on the tail.

Co. Lit.
14. b.
Roll. Abr.
623.

If a man dies seised of several parcels of land in one county, and after his death his eldest son enters into one parcel generally, and, before any actual entry into the rest, dies, this general entry into part shall vest in him an actual seisin in the whole, sufficient to establish a *possessio fratris* upon; for since the freehold in law is cast upon him by the death of his father, and since the possession is in nobody, and so no particular estate to be defeated, a general entry into parcel, in the name of all, may well serve to reduce the whole into an actual possession: but if his entry into parcel be special, it shall only reduce that parcel into possession; for it is reasonable to bound the operation of his act by the intention which he appears to have had in doing it.

Co. Lit. 15.

The advantages of this rule of *possessio fratris* do not only extend to the sister, but to her issue, who shall be preferred to the half-brother, because they represent the ancestor, and therefore shall succeed to those advantages, which their ancestor would have enjoyed if she had lived.

Co. Lit.
15. a.

There can be no *possessio fratris* of dignities, as duke, marquis, and the other honours annexed to the peerage, but the brother of the half-blood shall (a) inherit them; and this difference seems to be founded on a strict regard to the publick good, which is the better consulted when such persons are promoted to those dignities as are capable of discharging the great duties annexed to them.

baron by writ, was created Earl of Kent, to him and the heirs male of his body, and had issue two sons by several venters, the eldest of whom had issue a daughter, the barony shall go to the daughter *jure representationis*, but the earldom to the second son, according to its original limitation. Cro. Car. 601.

[Coll. Proc. on Claims of Bar. 195. But if it was of a feudal title of honour, as of the earldom of Arundel; or barony of Berkeley, there *possessio fratris* should hold well; because the title is annexed to the land.—So, of an office of dignity, and *et ratione* the office of high-chamberlain of England descended to the Earl of Lindsey of the whole blood, and departed from the line male of the Earl of Oxford; and adjudged accordingly in parliament. Hal. MSS. Coll. Proc. on Claims of Bar. 175. Sir W. Jon. 96.]

Co. Lit.
15. a.
3 Co. 42 b.
Cro. Car.
601.
(a) The
Lord Gray
being a

Also, the policy of the kingdom hath established laws and rules for the government of the possessions and descent of the crown, different from those which guide and direct the descents of private property: therefore, if the king hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands, and dies, and the eldest son enters and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit.
15. a.

(D) Of Descents according to Custom.

Li. § 210.
Co. Lit.
140. a.
Lamb. 608.
The head of
Gavelkind,
and Lamb.
628., that it
is probable
that most
lands in
England
were thus partible.

THERE are several customs as to descents, which having been allowed time out of mind, must be presumed to be coeval with the common law, and therefore cannot be altered without an act of Parliament, as that of *gavelkind* in *Kent*, by which the descent is first to all the male children, then to the females, then to collateral relations; but in this, according to the civil law, regard is to be had to the *stirpes*, and therefore if the eldest son had issue a daughter, she should inherit her father's share with the younger sons.

Co. Lit. 10.
Lamb. 607.
Hob. 31.
(a) Also for
a condition
broken, the

But if a remainder of lands of the nature of gavelkind be limited to the right heirs of *J. S.* the heir at common law shall take it, and not the heirs in gavelkind; for this remainder being (a) newly created, cannot be reckoned (b) within the custom.

heir at common law shall enter, because the condition is a thing of a new creation, and altogether collateral to the land. Lamb. 608. Co. Lit. 11, 12. (b) This custom, like all other customs that are derogatory from the common law, is to be construed strictly, because as far as the particular custom hath not derogated from the common law, the general custom of the whole kingdom ought to prevail. Roll. Abr. 568.

2 Lev. 87.
adjudged.
Mod. 96.
S. C. ad-

If a rent be granted out of gavelkind lands, it is of the nature thereof, and shall (c) descend to all equally; for the rent is part of the profits of the land, and issues thereout.

judged. [1 Freem. 105. 345. S. C. 3 Keb. 165. 214. S. C. 1 Vern. 489. S. C. cited.] *Vide* Noy, 15. and Bro. tit. *Custom*, 58. *cert.*; but *vide* 14 H. S. 9. 26 H. S. 4. Noy, 15. (c) That a trust shall descend accordingly. 2 Roll. Abr. 780.

Co. Lit.
140. a.

The general custom of gavelkind lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good.

For this,
and the rea-
sons thereof,

By the (d) custom of borough-english, the youngest sons only shall inherit.

vide title *Borough-English*. (d) Where the custom was laid, that if a copyholder dies seised, his youngest son should inherit, and the copyhold was granted to a man and his wife, and the heirs of the man, and he died, whether within the custom? 2 Leon. 208. *dubitatur*.

Co. Lit.
110. b.

If borough-english lands be let to a man and his heirs, during the life of *J. S.* and the lessee die, the youngest son shall enjoy them.

2 Lev. 138.
S. P. ad-
judged upon

If the custom be, that the youngest son shall inherit, the youngest (e) brother shall not inherit by force of this custom.

a special verdict. Roll. Abr. 623. 4 Leon. 242. Cro. Jac. 198. Cro. Car. 411. (e) If the custom of a copyhold be, that the eldest daughter shall have the land, the eldest sister shall not have it by the custom. Gossb. 166. Roll. Abr. 623. 4 Leon. 242. [So, if the custom be, that lands shall descend to the eldest sister, where there is neither a son nor a daughter, an eldest niece is not within it. *Denn v. Spray*, 1 Term Rep. 466.]—But by some customs the youngest brother shall inherit, and *consuetudo loci est observanda*. Co. Lit. 110. b.—Special custom, that lands in fee shall descend to the younger son, but lands in tail to the elder, is good. March, 54.—So, that lands shall descend to the younger son, if not of the half-blood; and if he be, then to the eldest. Co. Lit. 140. b.

If a custom be, that if a man dies without heir male, his eldest daughter shall have the land; and if he have no daughter, that the eldest sister shall have the land; and if he have not a sister, the eldest cousin; but if he have an heir male, that he shall have it before any of them; and the tenant of the land have several daughters, but no heir male, and the eldest daughter die in the life of the tenant of the land, having issue a daughter; this grandchild is within the custom, and shall have the land by descent upon the death of the grandfather.

Roll. Abr.
623. God-
frey and
Bullock.

But if the custom be, that the youngest son shall inherit, and a man have issue two sons, and the eldest have issue two sons, and die, and the lands descend to the youngest son, who dies without issue, the eldest son of the eldest brother shall have the land, because the custom holds not in the (a) transveral line, but only in the lineal descent.

Roll. Abr.
624. re-
solved per
Cur.
(a) If a co-
pyholder of
the nature
of borough-

english, surrenders to the use of himself and his wife, and his heirs, and dies leaving issue three sons, and the youngest dies in the lifetime of the wife; the eldest brother shall inherit, as heir to the younger brother; for the custom cannot extend to the collateral descent. Roll. Abr. 624. Cro. Car. 411. Jon. 360. S. C. by two judges against two.

If there be a custom within the manor of T. that if the father dies, leaving no son, but two or more daughters, that the eldest daughter shall have his land for her life only, and after her death it shall descend to the next heir male that can derive by males; and for want of such, that it shall escheat to the lord; and there is another custom, that if the tenant dies, and leaves a wife, that she shall have it for her life; and a copyholder of the manor dies, leaving a wife and two daughters, and no son, and his wife enters, and the eldest daughter dies, and after the wife dies, the second daughter shall have the lands for life, within the custom; for though she was not the eldest at the death of her father, yet she was so at the death of her mother, whose estate was a continuance of the father's estate, as in case of free bench.

Lev. 172.
between
Newton and
Shaftoe, ad-
judged, and
that the
custom was
good, ac-
cording to
Co. Lit.
140. b.
Keb. 925.
2 Keb. 111.
S. C. Sid.
267. S. C.
adjudged,
and that the
custom was

good; though said in the report thereof, that it seemed to be admitted by all, that such custom, as to fee-simple lands, would be void; it being wholly against the nature of a fee to escheat as long as there are heirs; and 263, another case was said to have been adjudged accordingly, upon debate in B. R. in 20 Car. 2. between Sampson and Quinsey; but *vide* that case. Lev. 293. adjudged without argument, because the court said, the point had before been adjudged in the case of Newton and Shaftoe.

If A. hath issue five sons, and the youngest dies in the life-time of the father, leaving issue a daughter; after which the father purchases copyhold lands of the nature of borough-english; those lands shall, at the death of the father, go to the daughter of the youngest son *jure representationis*, and not to the fourth son, although he was the youngest son at the time of the purchase, and death of the father.

Sa'k. 243.
between
Clements
and Scuda-
more, ad-
judged.
6 Mod. 120.
S. C. ad-
judged.

1 P. Wms. 63. S. C. 2 Ld. Raym. 1024. S. C.

(E) Where a Person shall be said to take by Purchase, and not by Descent.

Lit. § 4.
Co. Lit. 13.

IT is an established rule in descents, that none can inherit as heirs, but those who are of the blood of the purchaser; and, therefore, if lands descend to the son of the part of the father, and he enters, and after dies without issue, the lands shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother; and if there be no heirs on the part of the father, then they shall go to the lord by escheat.

Lit. § 4.

(a) But if a man gives lands to another and his heirs of the part of the

mother, yet the heirs of the father's part shall inherit; for no man can institute a new kind of inheritance, not allowed by the law. Co. Lit. 13. But *vide* Co. Lit. 354., that lands may be given to a man and his heirs, on the part of the father; in which case, none of the heirs of the part of the mother shall ever inherit; but in such case, the inheritance, as long as it continues, descends according to the rules of law, though it be determinable for want of heirs on the part of the father.

mother, yet the heirs of the father's part shall inherit; for no man can institute a new kind of inheritance, not allowed by the law. Co. Lit. 13. But *vide* Co. Lit. 354., that lands may be given to a man and his heirs, on the part of the father; in which case, none of the heirs of the part of the mother shall ever inherit; but in such case, the inheritance, as long as it continues, descends according to the rules of law, though it be determinable for want of heirs on the part of the father.

Plow. 446,
447.

So, if a grandfather had purchased lands in fee, and the lands had descended from him to the father, and from him to the son; if the son had entered, and died without issue, his father's brothers or sisters, or their descendants; or for want of them, his grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandmother's brothers or sisters, or their descendants, might have inherited; but none of the line of the mother or grandmother, *viz.* the grandfather's wife, should have inherited, because not of the blood, either by father or mother, of the first purchaser, *viz.* the grandfather.

Co. Lit.

12. b.

(b) Where the ancestor takes but a particular estate, and the limitations after operate by way of purchase, and not by descent; *vide* head of *Remainders*, and Co. Lit. 22. Styl. 148. Co. 93. Moor, 116. And. 69. Hob. 30. Vent. 372. 2 Lev. 75. Raym. 228. Med. 121. 226. 2 Mod. 207. 4 Mod. 380. Carth. 272. (c) So, if he levies a fine *jur cognizance de droit*, &c. to A. and B., and by the same fine they grant and render the lands to him and his wife in tail, remainder to his right heirs; this makes it a new purchase, and the heirs of the part of the father shall inherit. Carth. 140. adjudged.

A man seised of lands as heir of the part of his mother, makes a feoffment in fee, and takes back an estate to him and his (b) heirs, this is a (c) new purchase of the lands, and consequently, if the purchaser dies without issue, the heirs of the part of the father, and not the heirs of the part of the mother, shall succeed him in it; for he is the original purchaser of that estate, which he takes back to him and his heirs; and therefore it shall descend as a new purchase.

Co. Lit. 13.

But if a man seised as heir of the part of his mother, makes a feoffment in fee to the use of him and his heirs, the use shall go to the heirs of the part of the mother; for the use being a creature of equity, must be governed by the rules of equity, which considers in this case, that the use springs and arises out of an inheritance

inheritance which belongs to the heirs of the mother, and will therefore assign it to them, as a trust which arises out of their property.

A man is seised of land on the part of his mother, and makes a feoffment in (a) fee, reserving rent to him and his heirs; this rent, since the statute *Quia emptores terrarum*, &c. if it has a distress annexed to it, must be considered as a rent-charge; and if it wants a distress, as a rent-seck; and so either way it is the grant of the feoffee, and consequently a (b) new purchase; and therefore it shall go to the heir of the part of the father, and not to the heir of the part of the mother.

Co. Lit.
12. b.
(a) But if he had made a gift in tail, or a lease for life of such lands, reserving a rent, the heir on the

mother's side should have had this rent, because the reversion belongs to such heir, and consequently the rent too, as incident to that reversion. Co. Lit. 12. b. (b) If a man, seised of a manor on the part of his mother, had, before the statute *quia emptores*, &c. made a feoffment in fee of parcel, to hold of him by rent and service; though this rent and service were newly created, yet continuing parcel of the manor, they shall, with the rest of the manor, descend to the heir on the mother's side. Co. Lit. 12. b.

If a man hath a rent-seck of the part of his mother, and the tenant of the land grants a distress to him and his heirs, and so improves the rent into a rent-charge; this distress shall go along with the rent to the heir on the part of the mother, as incident and appurtenant to it.

Co. Lit.
12. b.

If the heir of the part of the mother, of lands whereunto a warranty is annexed, is impleaded for those lands, and vouches, and judgment is given against him, and likewise for him to recover in value, and he dies before execution, the heir on the mother's side shall sue execution to recover in value against the vouchee; for the lands to be recovered in value are designed as a recompence for those lands which were recovered by the demandant from the vouchee, and so must go to that person who has sustained the loss.

Co. Lit.
13. a.

A man hath issue a son, and dies, and his wife dies also, and lands are let for life, the remainder to the heirs of the wife; the son dies without issue; the heirs of the part of the father shall inherit, and not the heirs of the part of the mother; for the lands vested in the son as a purchaser, and therefore the descent is to be governed by the rules of law.

Co. Lit.
13. a.

If a man be seised of lands on the part of his mother, and makes a feoffment in fee of them upon condition, and dies; this condition shall descend to the heir of the part of the father; because he is heir at common law; but if he enters for the condition broken, then he restores the estate to its former nature, and then the heir of the part of the mother shall enter upon him, and enjoy the land.

Co. Lit.
12. b.

If a man, having only two daughters, his heirs, devises his lands to them and their heirs, they take as (c) jointenants, and not as coparceners; for the devise giveth it to them in another degree than the common law would have given it them; and for the (d) benefit of the survivorship between them.

Cro. Eliz.
431. Owen,
65. S. C.
3 Lev. 127.
S. P. admitted per Cur.

(c) If to them and their heirs, equally to be divided between them, share and share alike, they are tenants in common. 2 Sid. 53. 78. Vide Godb. 361. 3 Leon. 25. Coull. 18., and 1 to *Jointenants and Tenants in Common*. (d) If a man devises lands to his son and his appent, and a stranger, they are jointenants for the benefit of the stranger. Godb. 4. Owen, 65.

Salk. 242. If *A.* hath issue two daughters, one of which dies in his life-
 between time, leaving issue *J. S.* a son, and *A.* devises his lands to *J. S.*
 Reading and and his heirs, *J. S.* shall take the (*a*) whole by purchase, and not
 Rowton, one moiety by purchase, and the other by descent.
 adjudged. (*a*) Palm.
 375. 2 Roll. Rep. 352. 2 Sid. 79. S. P.

Mor. 644. If a man devises lands to his eldest son, and his heirs, paying
 adjudged. 20 *l.* a-piece to his younger children, at their ages of twelve years;
 Cro. Eliz. and upon non-payment of the legacies devises the lands to his
 833. 919, younger children, and their heirs, the eldest son is in by descent.
 920. S. C. that the first devise to the eldest son, and his heirs in fee, being no more than the law gave him, was void;
 adjudged, but the devise to the younger, upon his non-payment, was good, by way of future or executory devise.
Visd title *Devises* and Vaugh. 271. S. C. cited. 3 Mod. 207. S. C. cited. 1 Roll. Abr. 411. S. C.
 cited. Leon. 101. 3 Leon. 216. 2 Sid. 79. 2 Mod. 7. 286. Dyer, 371. Hard. 204.

Salk. 241. So, if a man devises lands to his daughter's son in fee, who is
 Clerk and his heir at law, upon condition that he should pay 200 *l.* to such
 Smith ad- persons as the devisor's wife should appoint by deed; the wife
 judged, and makes no appointment, and the grandson enters, and dies with-
 Gilpin's out issue, the lands shall go to the heirs *a parte maternâ*; for the
 case, Cro. grandson took by descent, and not by purchase; for the devise
 Car. 161, gave him the same estate the law would have given him under a
 where it is possibility of being charged.
 adjudged, heir at law, upon condition to pay debts, and if he fails, that the executors shall sell, makes it a purchase
 that a de- in the heir at law, being tied with a condition, denied to be law by Treby, Ch. Just. and Powell, Just.
 vise to the Lutw. 793. S. C.

3 Lev. 127. If a man, being seised of lands on the part of his mother, de-
 Hedger and vises them to his executors for sixteen years, and after to one
 Row, ad- who is his heir *a parte maternâ*, he shall take by descent; for the
 judged. descent to the heir *a parte paternâ* or *maternâ* is but a consequent
 dependant upon the nature of the estate; though it was objected,
 it was better for him to take by purchase, for then the heirs of
 the part of the father might inherit before the heirs of the part
 of the mother, and so both heirs would be inheritable.

(F) Of a Descent, its Operation to take away an Entry.

Lit. § 385. **D**ESCENTS which take away an entry are of two sorts; 1st, Where
 (b) There the descent is in fee, as where a man seised of certain lands
 are also other or tenements is disseised, and the disseisor having issue dies seised,
 reasons for and the lands gained by the disseisin descend to his heirs; this de-
 this: as 1st, scent shall toll the entry of the disseisee, and oblige him to sue a
 Because the writ of entry *sur disseisin* against the heir of the disseisor, in order
 disseisee not to recover the right of possession which he hath lost by the de-
 having sced; and the (b) reason is, because the freehold being cast upon
 claimed the heir, the notions of the law make this title to him, that there
 during the may be a person in being to do the feudal duties, and to fill the
 life of the possession, and answer the actions of all persons; and since it is
 the disseisor, the right of possession must be pre-
 of possession sumed to be
 must be pre- derelict.
 sumed to be

antecedent to any act of his own, it must defend such possession from the act of any other person till it be evicted by judgment, which being the act of law, may destroy the heir's title.

2d, Because the relief was in the nature of a new purchase upon every descent, for the payment of which a distress was immediately taken upon the descent's being cast. 3d, The right of possession is gotten by descent, that it may be an encouragement to the tenant to be bold in war; for that none can dispossess his children of the estate he died seised of. Spelm. Feud. 31.

2dly, Descents in fee-tail toll entries; as if a man be disseised, and the disseisor grant the land in tail, and the tenant in tail having issue, die seised, and the issue enter, the possession being thrown upon the heir in tail, the law construes the right of possession to be in him, for the reasons above given, and therefore bars the entry of the disseisor. Lit. § 326.

If a disseisor make a gift in tail, and the donee discontinue in fee, and disseise the discontinuee, and die seised; this descent shall not take away the entry of the disseisee; for the descent of the fee-simple to the heir is defeated by his remitter to the estate-tail; and though by virtue of such remitter the heir is seised in tail, yet there is no descent of it, because the tail was discontinued; and the subsequent disseisin doth not regain it to the ancestor; and though the heir be remitted into his elder title, yet such remitter places him in only above the second disseisin, and doth not tend to make a descent of the estate-tail of which his ancestor never died seised; and where a new right springs to the heir by operation and construction of law, he ought to take, subject to the same claim, as ran upon such estate before the remitter, else the act of law would work an injury to the first disseisee, who possibly was prevented from bringing his assize or ejectment, by the frequent shifting of the possession; and the law of descents being in prejudice of an ancient right, is to be taken strictly, and therefore to take place only where the same estate descends from ancestor to heir; and the rather, for that after discontinuance the disseisee might not watch the death of the tenant in tail, whose interest was transferred, and therefore no presumptive dereliction of the disseisee could be formed in this case. Co.Lit.238.

A disseisor makes a gift in tail, the donee has issue, and dies seised, the entry of the disseisee is taken away; but if the issue die without issue, so that the estate-tail is spent, then the entry of the disseisee is revived, and he may enter upon him in reversion or remainder; for in this case there is no relief to be demanded from him in reversion or remainder; so that he labours under no hardship in that point, for which he might expect favour from the law: Likewise, the possession is not cast on him till entry; which being a voluntary act, the law annexes no privileges to it, as in case where a possession is cast on an heir by descent. Co.Lit.238.

Grandfather, father and son, the son disseises one, and enfeoffs the grandfather, who dies seised, and the land descends to the father, the disseisee cannot enter, for the right of possession is devolved on the father, (who had no hand in the disseisin,) by a fair and legal descent; but if the father dies seised, and the land descends to the son, the disseisee may enter on the son, for the feoffment

ment made by the disseisor to the grandfather is a stratagem to derive the lands gained by disseisin to the son by descent, in order to enjoy the benefit annexed to such conveyance, which the law will never cherish; but on the contrary blast such designs, to discountenance all wrong and oppression.

Lit. § 387,
388, 389.
394.

In descents which toll entries, it is required, that the ancestor die seised of a freehold and fee, or a freehold and fee-tail; for if the disseisor, at the time of his death, hath not the freehold in him, it cannot be cast on his heir, for then there is no danger that the freehold should want a possessor; and therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor; and if the right of possession be not transmitted at the death of the ancestor, the law will not afterwards create him a new title in prejudice of the person that has the right of propriety: if a disseisor therefore makes a lease for life, he parts with the possession, and cannot transmit it to the heir, having parted with it before; and a descent of a reversion will not make a right of possession; for nothing descends to the heir in reversion but a right of reversion, and that is a right against all persons but the disseisee; for since only a right descends, the heir can be in no better case than the disseisor was at the time of his death; and, therefore, when the tenant for life dies, he has only the naked possession, as the disseisor had it; but if the disseisor had died in possession, the law, for the reasons aforesaid, casting the possession on the heir, makes it a right; for that is properly a right which a man comes to by act of law; and since the heir in such case comes to the possession by act of law, it must be called a right of possession; and it could not be a right of possession, if he could not defend it against all aggressors; and therefore in such case the right of entry is taken away from every one; and hence arose the distinction of *jus proprietatis* and *jus possessionis*.

Co. Lit.
239. a.
Hob. 323.

If he in reversion disseise his tenant for life, and die seised, this descent shall take away the entry of the tenant for life; for the right of possession is by law cast upon the heir.

Co. Lit.
239. a.

So, if there be tenant for life, remainder in tail, remainder in fee, and tenant in tail disseise the tenant for life, and die seised, this descent shall take away the entry of the tenant for life; but if the king's tenant for life be disseised, and the disseisor die seised, this descent shall not take away the entry of the tenant for life; for since the king cannot be disseised, the disseisor gains but a bare estate of freehold during the life of the lessee; and therefore the law does not cast the possession on the heir; for if the heir comes into the possession, he must come in as an occupant, which being a voluntary acquisition, the law does not favour it, as it does a right of possession devolved by descent.

Co. Lit.
239. d.

If a disseisor make a lease to a man and his heirs during the life of J. S. and the lessee die, living J. S. this shall not take away the entry of the disseisee, because the heir is only in as a special occupant of an estate of freehold, and not of a fee or fee-tail.

If a disseisor make a lease for years, or has the land extended upon a statute-merchant, staple, judgment, or recognizance, and dies seised; this descent shall take away the entry of the disseisee, because the freehold or fee are cast on him by act of law. Co. Lit. 239. a.

The descent of incorporeal inheritances, as advowsons, rents, &c. do not take away the entry of him who hath right, because no disseisin can be committed of them, but at the election of the owner thereof. Co. Lit. 237. b.

If a disseisor make a lease for his own life, and die, this descent shall not take away the entry of the disseisee; for though the freehold and fee descend to the heir of the disseisor, yet the disseisor died not seised of both, because his death was to precede the determination of the lease, which carried the freehold to his heir. Co. Lit. 239.

Descents to a brother, sister, uncle, or other collateral heir of the disseisor, take away the entry of the disseisee, as well as if the disseisor had had issue, and the descent had been to them.

(G) In what Cases the Entry of the Disseisee may be lawful, notwithstanding a Descent.

LORD and tenant; the tenant is disseised, and the disseisor aliens to another in fee, and the alienee dies without issue, whereupon the lord enters, as upon his escheat; this does not take away the entry of the disseisee, because the lord does not come to the land by descent, but by escheat, for want of a tenant, which can warrant his title no longer than such tenant is wanting, nor hinder the disseisee from entry, who is that tenant; but if the lord by escheat die seised, and the land descend to his heir; here is a perfect descent, which shall take away the entry of the disseisee; also his heir upon such descent must pay relief, which the lord upon the escheat only was not obliged to do. Lit. § 390. 2 Inst. 286. Co. Lit. 240.

If a disseisor die seised, and his heir without heir, the disseisee cannot enter upon the lord by escheat, because his entry was taken away by the descent cast before, and then whoever comes to the lands shall take the benefit of it. Co. Lit. 240. a.

A man seised of lands in fee, or in tail, upon condition, dies seised, if the condition be broken in his lifetime, or after the lands descended to his heir, yet the entry of the feoffor, or donor, or their heirs, is not taken away. Lit. § 391.

So, if such tenant on condition be disseised, and the disseisor die seised, and the lands descend to his heir, the entry of the tenant on condition is thereby taken away; but if the condition be after broken, the feoffor or donor, or their heirs, may enter; because the condition went along with, and was annexed and incorporated in the land into whose hands soever it came, and the feoffor or donor have no other remedy but by entry, which is their title, as the tenant on condition, who is disseised, has; for he having a right, his remedy for it against the heir of the disseisor is by action; and till the condition broken, as well the *ius proprietatis*

prietatis as the *jus possessionis* is in the feoffee; but when he is disseised, and a descent cast, the heir of the disseisor has only the *jus possessionis*.

Co. Lit.

240. b.

[(a) *2g.* as the writ

causâ matri-

monii prælo-

cuti extends

to all de-

grees? see the writ in the register. Booth, 197. F. N. B. 205.]

He that hath title to enter upon a mortmain shall not be barred by a descent, because then he would be without remedy, for he can maintain no action for it. So, where a woman hath title to enter *causâ matrimonii prælocuti*, no descent shall take away her entry, because she has no remedy by action to recover it (a).

Co. Lit. 240.

(b) So, if

one hath

title to enter

for consent

to a ravi-

ment, a

descent cast

shall not take

away his entry,

because he

has no other

remedy, nor

can maintain

any action for it.

Co. Lit. 240. b.

[(c) The devisee,

it seems, is

not without

remedy, for

according to

Co. Lit. 111. a.,

he may either

enter, or have

his writ *ex*

gravâ quare-

clâ. But see

Ow. 141. 1

Leon. 209.]

If a man seised of lands in fee, by his last will in writing devises them to another in fee, and dies, whereby the freehold in law is cast upon the devisee, and the heir, before any entry made by the devisee, enters and dies seised; this descent shall not take away the entry of the devisee, because then he would be without (b) remedy, (c) having never had possession.

Lit. § 393.

If a disseisor die seised, and his heir enter and endow his mother, the disseisee may enter upon her for that third part, because she is in continuance of her husband's estate, and not by the heir; and therefore, as to that third part, the descent is (d) interrupted or defeated; but till endowment the disseisee could not enter upon any part, nor after such endowment can he enter upon the other two parts, because as to them the descent was perfect, and continues, but as to the third part, the wife's title was paramount to the descent.

(d) So, of

tenant by

the curtesy.

1 Salk. 241.

Lit. § 395.

If a disseisor enfeoff his father in fee, and the father die seised of such estate which descends to the disseisor as heir, yet the disseisee may enter, because coming again to the disseisor, he shall take no advantage of the descent *quia particeps criminis*; but the disseisee may either enter or have his assise against him.

Lit. § 406.

Co. Lit. 242.

If a man seised of lands in fee hath issue two sons, and dies seised, and the younger son enters by abatement, and has issue, and dies seised, and the lands descend to his issue, who enters; yet the eldest son or his heir may enter upon them, because the entry of the youngest son shall be intended upon a claim as heir, and the eldest son claiming as heir likewise, and so by the same title, may enter upon him, or any of his issue, be there never so many descents: also, the entry of the youngest may be intended to prevent others, and so to continue it in the family, and not with design to injure or strip his brother of it; and then his brother's entry cannot be taken away: but if the younger brother, in this case, had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry of the eldest brother, because the feoffment made title by livery to the feoffee, and carried it out of the family.

Co. Lit.

242. b.

If the younger brother of the half-blood enters by abatement, and a descent is cast, or if the eldest brother hath issue, and dies, and

and after his death the younger brother or his issue enter, and many descents are cast in his line; yet the eldest son, or his heirs, may enter; for though the brother of the half-blood cannot be heir to his eldest brother, yet he may by possibility be heir to his father if the eldest brother dies before actual possession; and therefore shall be presumed to enter only to preserve the feud in the same family, and keep out strangers, and not in opposition to the lineal heir of the family.

But if the elder brother had first entered, and the younger brother had entered upon him; this had been in destruction of the elder brother's possession, and as much a disseisin as if it had been committed by a stranger, and then his dying seised shall take away the entry of the eldest brother, or his issue. Lit. § 397.

If after the death of the father a stranger abates, and the younger son enters on him, and dies seised; this descent shall bind the eldest, because *possessio terre* must be *vacua* when the youngest son enters, which here it was not; but his entry on the abator having no right, was a disseisin, and, by consequence, a descent thereon will take away the entry of the eldest brother; for his entry was a disseisin, not an abatement. Co. Lit. 242. a.

Lands are given to husband and wife, and the heirs of their two bodies; they have issue a daughter, and the wife dies, the husband has issue a son by another wife, who upon the decease of the father abates, and dies seised; this descent shall take away the entry of the daughter, for by the limitation in special tail, the son by another *venter* was utterly incapable of inheriting them; and being an estate which the son could not in any case make title to as representative of the father, his entry is an abatement; for the law cannot make that charitable construction here, that he entered to preserve the estate from strangers that might have abated upon the estate, since the son himself is a stranger, and could not inherit; but in the case of the brother of the half-blood it was otherwise, because he might have inherited his father. Co. Lit. 242. a. b.

If a man be seised of land of the nature of borough-english, and have issue two sons, and die, and the eldest son, before any entry made by the youngest, enter into the land by abatement, and die seised; this shall not take away the entry of the youngest brother, because the eldest son shall be presumed to enter to preserve the estate in his family, which he or his heirs may some time or other, upon failure of his brother's line, happen to enjoy. Co. Lit. 242, 243.

The same law holds likewise in intrusions as well as in abatement; therefore, if a father makes a lease for life, and hath issue two sons, and dies, and the tenant for life dies, and the youngest son intrudes, and dies seised; this descent shall not take away the entry of the eldest, for the reasons before given: otherwise, if the father had made a lease for years only, because the possession of the lessee for years made an actual freehold in the eldest son, so that the entry of the youngest cannot have such construction, but is a disseisin, because there is no *vacua possessio*. Co. Lit. 243.

Co. Lit.
243. a.

If one coparcener enter into the whole, claiming it to herself, and take all the profits, yet such entry shall be intended only in preservation of the estate, and, therefore, a descent in such case shall not bind the other sister as to her moiety: but if she disseise the other, after both have entered, and die seised, there, such descent will take away the entry of the eldest, or her issue.

Co. Lit.
243. b.

So, if such coparcener enter, claiming the whole, and make a feoffment in fee, and take back an estate to her and her heirs, and have issue, and die seised; this descent shall take away the entry of the other sister, because the feoffment leaves no room for a presumption that her entry was to preserve the estate of the other sister; and in the other case, the claiming the whole only makes the abatement as to her sister's moiety; for if one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and no divesting of the sister's moiety.

Lit. § 407,
408.

If an infant disseise one, and alien in fee, and the alienee die seised, and the lands descend to his heir, the infant being under age, the entry of the disseisee is taken away; but if the infant disseisor enter upon the heir of the alienee, as he may well do, not being bound by his alienation made under age, then may the disseisee enter upon him, because the descent to the heir of the alienee, which took away the entry of the disseisee, is now avoided, and the infant disseisor may enter at any time within or after full age.

Lit. § 409.

So, if a disseisor make a feoffment in fee, upon condition, and the feoffee die seised, this gains a right of possession to his heir, and takes away the entry of the disseisee; but if the disseisor enter for the condition broken, then is the descent defeated, and the entry of the disseisee revived, because the disseisor is then in of his defeasible estate, having only a naked possession without any right.

Co. Lit.
243. b.

A civil death, as entry into religion, does not take away an entry, for this was the voluntary act of the ancestor; and though there be a descent cast upon it, yet it is not such a descent as came by the act of God, and therefore shall not take away the entry of the disseisee.

Lit. § 411.

If I demise lands to a man for years, and am disseised, and my termor ousted, and the disseisor die seised, and a descent is cast, I cannot enter, but my lessee may, because his entry is only to regain his term, and leaves the freehold and fee in the heir by descent, as it was before.

Co. Lit.
245. a.

So, such descent shall not take away the entry of tenant by *elect*, statute-merchant, &c. for these are only particular interests, of which, as of a term for years, there can be no dying seised, or descent thereof to the heir; but the freehold, which did descend, they leave as it was before, in the heir by descent.

Co. Lit. 249.
Lit. § 412.

In the times of domestick war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin were in times of peace; for then the disseisee would be without all remedy, there being no courts open wherein to bring his ac-

tion:

tion: also, the descent, which is an act of law, can give no right, when the law itself is silent; but in the times of foreign war only, a descent shall take away an entry; for to encourage enterprising in such war was this privilege chiefly given to the heir of the disseisor.

No dying seised of bishops, abbots, deans, parsons, &c. where the lands come to his successor, shall take away an entry; for the successor comes in by his own act and concurrence, and therefore shall have no more privilege than his predecessor had: also, the successor pays no relief, unless by grant or prescription; for the ecclesiastical lands were not relieved into the hands of the lord.

Co. Lit. 250.
Lit. § 243.

(H) Whose Entry is preserved notwithstanding a Descent.

AS to infants and (a) feme covert, their entry is not taken away by a descent, by reason of their weakness and incapacity to claim, which is not imputed to them.

feme sole is disseised, and after her husband dies she takes another husband, and then the descent happens; this descent shall take away the entry of the feme, for she had once an opportunity of entering.

1 Saik. 241.

Gillb. Ten.
28. Lit.
§ 402, 403.
(a) But if a

If a man seised of lands in fee dies, his wife *privement enseint* with a son, and a stranger abates, and dies seised; and after, the son is born, he shall be bound by the descent, because at the time of the descent he had no right to enter, not being then *in esse*, and by consequence, had no wrong then done him; and the lord had none to avow upon for his services at the time of the descent.

Co. Lit.
245. a.

B. tenant in tail cuseffs A. in fee, who hath issue within age, and dies, B. abates and dies seised, the issue of A. being still within age; this descent shall bind the infant; because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.

Co. Lit.
246. a.

If a feme sole seised of lands in fee be disseised, and then take husband, and the disseisor die seised, and a descent be cast, this shall take away the entry of the wife after her husband's death, because being disseised when she was sole, she might have entered, and her taking a husband, who would not enter, was her own act and folly: but if she were under age at her marriage, the privilege of her infancy then, and coverture after, shall preserve her right of entry, though a descent be cast.

Co. Lit.
246. a. b.

If a descent be cast, this shall bind a person *non compos*, &c. but not his heir, because if any action should be brought against such person after recovery of his understanding, he could only plead his insanity in excuse at the time of such descent: and the law does not permit a man to stultify himself.

Lit. § 4.
Co. Lit. 247.
Gillb. Ten.
29. [F. N. B.
262. 2 Bl.
Com. 291.
Cro. Eliz. 393.]

A descent cast, during imprisonment, shall not bind, because during such confinement he cannot be supposed to know of the descent,

Co. Lit.
259. a.
Lit. § 436.

[But if he were at large when he was disseised, and the descent be cast during his imprisonment, this descent shall bind. Co. Lit. *ubi supr.*]

Lit. § 439. So, a descent cast, during the absence of one in foreign parts, shall not bind, but that on his return he may enter, because he cannot be supposed to know his affairs at home, or to take such ways as might secure it: but if he were within the realm at the time of the disseisin, or at the time of the dying seised, then a descent cast, though in his absence after, shall bind, because he might be presumed to have consance of it, and therefore ought to have taken care to prevent it before his departure, or before the death of the disseisor.

Lit. § 443. Co. Lit. 260, 261. If an abbot of a monastery die, and during the vacation a disseisin be committed, and a descent cast before the election of a new abbot, this shall not bind his entry after, because there was no person during the vacation that could make continual claim, (the convent being in law all dead persons,) and therefore there can be no laches imputed to any.

(I) How the Entry may be preserved by continual Claim: And herein,

1. Of the Nature of continual Claim, and the Effects of it.

Lit. § 414. Glub. Ten. 33. **C**ontinual claim is where a man, who hath a right and title to enter into any lands or tenements, whereof another is seised in fee or in tail, makes continual claim to them before the person dies seised thereof, the effect of which is, that, notwithstanding any descent cast after, yet he who made such continual claim may enter, because he hath done all that, perhaps, he could or durst do to regain his possession, and so no default being in him, his right of entry remains as it was before, notwithstanding any descent.

Lit. § 415. If tenant for life alien in fee, he in reversion or remainder may enter on the alienee, or make continual claim to the land before the dying seised of the alienee, and then he may enter at any time after his death, though a descent be cast.

Lit. § 416. Lands are let for life, remainder for life, remainder in fee; tenant for life aliens in fee, and the remainder man for life makes continual claim before the death of the alienee, and then the alienee dies seised, and then the remainder man for life dies likewise before any entry; yet in this case he in the remainder in fee may enter by virtue of the continual claim made by the remainder man for life; for since the efficacy of this continual claim, if there had been a subsequent entry made by the remainder man for life, would have extended to the remainder in fee by reverting that too, it is but reasonable to allow the remain-

der-man in fee a power of entry under such continual claim, especially since by reason of the intermediate remainder, he himself could not make continual claim.

2. What is necessary to a continual Claim to make it effectual.

If a man hath cause to enter into lands lying in several towns in the *same county*, and enter into parcel in one town only in the name of all the rest, this shall be sufficient to secure his entry into all the rest. Lit. § 417,

But if the lands lie in *two counties*, the entry must be in each, because the attestation of both facts, if controverted, must be by the *parcs* of each county.

If three men disseise me *severally* of three several acres of land in *one county*, and I enter into one acre in the name of all the three acres, this is good for no more than that one acre, because each disseisor made a distinct entry, which being distinct acts of notoriety require distinct solemnities to defeat them: likewise, each having an independant possession, an entry upon one of them can never affect the rest, so as to destroy their separate possessions. Co. Lit. 252.

So, if one man disseise me of three acres of ground, and devise them severally to three persons for their *lives*, my entry upon one lessee in the name of the whole will only revert what belongs to that lessee; for where there are *different liveries* there must be different acts of notoriety to overthrow them, and, therefore, a different entry must be made on each tenant of the freehold. Co. Lit. 252. b. 4 Leon. pl. 35. Holland and Hopkins, Dal. 88. pl. 2.

But if the disseisor had demised the three acres severally to three persons for *years*, then an entry upon one of the lessees in the name of all the three acres would have recontinued and reverted all the three acres in the disseisee; for though they are different demises, yet being all terms for years, they are *not different liveries* to be defeated by distinct entries, and, therefore, one entry will suffice to regain the possession from the disseisor by overthrowing his entry by an act of equal notoriety. 4 Leon. pl. 35. Co. Lit. 252. b. Palm. 402. Lady Argol and Cheney.

I am disseised by the same person of one acre at one time, and of another acre in the *same county* at another time; in this case my entry into one of them in the name of both is good, for though there are two entries, yet it is but one continued act of wrong, and but one possession is gained, for which but one assise lies, therefore one entry of the disseisee is an act of sufficient notoriety to revert the possession of both acres. Co. Lit. 252. b.

If one disseise me of two several acres in *one county*, and I enter into one of them generally, without saying in the name of both, this shall revert only that acre where entry is made; for the *intent*, which is the rule to judge of a man's actions, appearing to extend no farther than that one acre, shall not be enlarged to revert the possession of the other. Co. Lit. 252. b.

Livery within view and entry afterwards is equal to an entry on the land itself, and if a man cannot enter for fear of an outrage, yet it is good. So also, a claim within view is good when a man fears to enter, for in the case both of entry and claim a man ought Co. Lit. 252. Lit. § 419, 420, 421. 2 Inst. 483

to take possession where he can, because it is the change of possession makes the notoriety in both cases; but if the disseisor menace to hurt the person that has right, then the law allows him to make his claim as near the land as he dares to come.

Co. Lit.
253. b.
2 Inst. 483.

But every apprehension of danger will not warrant a claim within view; for if a man fears the burning of his houses, or the taking away or spoiling of his goods, this is not a sufficient ground to warrant a claim within view, because if he should suffer what is threatened, he may recover what he loses, or damages to the value, without any corporal hurt.

Co. Lit.
253. b.
2 Inst. 483.

The *apprehension* then that will justify a man's claiming within view, must be of the person's lying in wait with weapons, or by words menacing to *beat, maim, or kill the person* that offers to enter; as also the *fear of imprisonment*; for the law will never oblige a man to hazard his person in such a manner as may render him unfit to serve his country, when he may recover his right without such danger, *viz.* by making claim within view.

In pleading, the disseisee must shew some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find that the disseisee did not enter for fear of corporal hurt, it is sufficient, and it shall be intended they had evidence for what they find.

3. Of the Time in which it is to be made.

Co. Lit. 237.
b. 254. b.

In ancient times, if the disseisor had been in long possession, the disseisee could not have entered upon him: so, if the feoffee of the disseisor had continued a year and a day in quiet possession, the disseisee could not have entered upon him; for the disseisee's neglect of entry for that time formed a presumption, that either he had no right in the lands, or that he relinquished it, especially in the case of the feoffee of the disseisor, because he came in by a legal conveyance and the solemnity of livery, which gave notice to the disseisee, in whom the possession was, so that he might have entered on the feoffee immediately, and recovered the possession.

Lit. § 427.
Co. Lit.
255. a.
[By stat.
21 Ja. 1.
c. 16. No
man shall
make entry
upon any
lands, but
within
twenty
years after
his right

But the law has been altered in this point; for if a man is now disseised, and the disseisor continues in possession for forty years without any claim made by the disseisee, yet if the disseisee at last make his claim before the death of the disseisor, it shall secure his entry for a year and a day after such claim made, to be computed from the day of the claim inclusive, notwithstanding any descent cast in that time; but if he suffers the year and day after the claim made to elapse, then a descent after will bind him; and so *toties quoties* after a year and a day after any claim made, a descent will conclude his entry.

shall first accrue. And by stat. 4 Ann. c. 16. § 16., no claim or entry upon any lands, &c. shall be sufficient to avoid a fine levied of such lands, or to satisfy the statute of limitations, unless an action be commenced within one year after, and prosecuted with effect.]

The rules of law concerning continual claim, and the effects of it, hold as well in relation to abators and intruders, their donees and feoffees, as in relation to disseisors, their donees and feoffees, and for the same reasons. Lit. § 428.
Co. Lit.
255, 256.

If the disseisor dies seised within a year and a day after the disseisin, and before any entry by the disseisee, this gives a right of possession to the heir, because when the disseisee yields up the possession peaceably, the presumptive right is in the disseisor, and the year and day which should aid the disseisee in such case shall be taken only from the time of the claim made by him, not from the time the title of entry accrued to him; and therefore, it is adviseable for the disseisee to make his claim as soon after the disseisin as he can. Lit. § 426,

Since *Littleton* wrote, an alteration as to the entry of the disseisee on the death of the disseisor has been made by 32 H. 8. 32 H. 8.
c. 33. Co.
Lit. 238.
cap. 33. by which it is enacted, "That except such disseisor hath
" been in the peaceable possession of such manors, lands, &c.
" whereof he shall die seised, by the space of five years next af-
" ter such disseisin, &c. without entry or continual claim, &c.
" that such dying seised, &c. shall not take away the entry of
" such person or persons, &c."

But still after the five years, continual claim must be made as at the common law, since the statute which is introductive of a new law does not provide for it after the five years. Co. Lit.
238. a.

It is said that abators and intruders are not within the statute, because it is penal, and extends only to a disseisor in express words, which was the most common mischief, & *ad ea quæ frequentius accidunt jura adaptantur*. Co. Lit.
238. a.
Plow. 47. a.
Quære.

The feoffee of a disseisor for the same reason is held to be out of this statute; but in respect of the disseisor himself the statute is construed with that latitude which may best preserve the ancient right; therefore, though the statute speaks of him that at the time of such descent had title of entry, or his heirs, yet the successors of bodies politick, so they be confined to a disseisin, are within the remedy of this act, for the statute extends clearly to the predecessor's being disseised, and, consequently, without naming the successor extends to him, for he is the person that at the time of such descent had title of entry. Co. Lit. 238.
a. 256. a.

If a man make a lease for life, and the lessee be disseised, and the disseisor die seised within five years, the lessee for life may enter; but if he die before he enters, it is said the entry of the reversioner is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the statute speaks: but if lessee for life had died first, and then the disseisor had died seised, he in reversion had been within the remedy of the statute, because he had title of entry at the time of the descent, and so within the express letter of the statute, though he was not the immediate disseisee. The same law of a remainder. Co. Lit.
238. a.
Plow. 47. a.

Detinue.

(a) It lies against a man that hath goods either by delivery or finding.

DETINUE is an action that lies for the recovery of goods and chattels, though the party came to the possession of them by (a) lawful means, as by bailment, borrowing, or pledging; and in this action the plaintiff is to recover the thing in specie, or (b) damages for the detainer.

Co. Lit. 286. Roll. Rep. 128. (b) 2 H. 6. 15. Roll. Abr. 575.

(c) For this *vide tit. Wager of Law.*

(d) 10 Co. 57. a.

Moore, 431.

Cro. Jac. 244.

Yelv. 178.

(e) *Vide tit. Trover and Conversion.*

But as in this action the defendant was allowed to (c) wage his law, (for it was thought but reasonable that the bailor trusting to the bailee's honesty and integrity at first, should also trust to his oath in a court of justice, since the restitution might have been secret,) and this was (d) found exceeding inconvenient, it being often experienced that those, who were so dishonest as to retain the goods of another, would generally purge themselves on their oaths, the action of (e) trover and conversion was substituted in the place thereof, which being the action usually made use of at this day in those cases, I shall but briefly consider,

(A) By and against whom Detinue lies.

(B) For what Things it may be brought.

(A) By and against whom Detinue lies.

Roll. Abr. 607.

(f) A man that hath a special and limited property, as a

IF a bailee deliver the goods to another, he shall have an action of detinue against him, (f) because he hath his possession, and undertakes for the custody, and the original bailor may have his action against either of them, because in him is the property, which both are bound to answer to him.

as a carrier that hath goods delivered, or a sheriff by *feri facias*, shall have this action against a stranger that takes away the goods, because they are answerable in damages to the absolute owner. 2 Bulst. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Jac. 73. Dyer, 98, 99. Lev. 282. Vent. 52. Danv. Abr. 20. pl. 4, 5.

Sid. 438.

If A. takes the goods of C., and B. takes them from A., C. shall have his action against A. or B. at his election, because both damaged C. in their taking.

If

If a man detains the goods of a feme covert which came to his hands before marriage, the husband can (a) only bring detinue, because the law transfers the property to the husband, but both shall join in *trover*, because the wrong was originally commenced at the time when the wife was sole; and if such injury be punished, the wife herself, who received this injury, must be party to the action, and the wife's demand is sufficient to prove a conversion in the defendant, since one of the parties to the action is denied the goods; but if the possession be laid in both it is ill, because if both were possessed, the law will transfer in point of ownership the whole interest to the husband.

and conversion lies against both, because both were concerned in the trespass. Roll. Abr. 607.; but for this *vide* title *Trover and Conversion*.

If A. delivers goods to B. to be delivered over to C., either A. or C. may have detinue against B.; for not delivering them over, according to the undertaking, is an injury done each of them.

Sid. 172.
Keb. 641.
Noy, 70.
Styl. 261.
Yelv. 165.
(a) So, if goods come to a feme covert before marriage, detinue lies against the husband only, but *trover* against both.
9 H. 6. 53.
b. 60.
Roll. Abr. 606.

(B) For what Things it may be brought.

IT has been (b) holden formerly, that detinue will not lie for money, unless in a box or bag, nor for corn out of a sack, because these things have no mark whereby they may be known in order to be re-delivered to the plaintiff.

N. Dyer, 22. 2 Bullt. 308. Roll. Rep. 59, 60. Lit. Rep. 242. Noy, 12. *Q. & vide* title *Trover and Conversion*, that *trover* will lie for money out of a chest or purse.

(b) 7 H. 4. 3. b.
Co. Lit. 286.
Cro. Eliz. 457.
Moor, 394.

It seems, however, clear, that if a man (c) lends a sum of money to another, detinue does not lie for it, but he must bring debt on the contract, or *assumpsit*.

(c) Where, if a wife loses money at play, the husband may maintain *trover* for it. Title *Trover and Conversion*.

18 H. 6. 20. b.
Roll. Abr. 606.

So, where a man comes to buy goods, and they agree upon a price, and a day for the payment, and the buyer takes them away, detinue does not lie, but an *assumpsit* for the money, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree on a price for present money, and the buyer takes the goods away without payment, detinue lies, because the property is not altered; and, therefore, the taking away the goods without payment of the money is an injurious taking, for which the action lies: but if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer.

Cro. Eliz. 867.

Detinue lies for writings in a box, or for writings themselves though not in a box, and though the date be not mentioned, or the delivery of the writings, as a deed; and it lies for a husband and wife, for a deed by which an annuity is granted to the wife,

Co. Lit. 286.
17 E. 3. 4.
Roll. Abr. 606.

(a) In detinue for every man that has a property in deeds may bring his action for the (a) detaining of them.
 issue be upon the detinue, and it be found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, for it appears he cannot have them; but he shall recover the value of the land in damages. 17 E. 3. 45. b. Roll. Abr. 607.

Cro. Jac. 39. Couple-dike and Coupledike. Detinue lies not for a house, and therefore where the plaintiff had declared *de una domo vocat.* a bee-house, upon a writ of error the judgment for this default was reversed.

Salk. 223. By the act of navigation 12 Car. 2. cap. 18. certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same: it was adjudged, that, in this case, the subject may bring detinue for such goods, as the lord may have replevin for the goods of his villein distrained, for the bringing of the action vests a property in the plaintiff.
 Roberts and Wetherall, adjudged.
 5 Mod. 193.

Devises.

For the learning upon this head, see title *Wills and Testaments.*

Discontinuance.

For discontinuance of process, *vide* heads of
Discontinuance of an estate in lands, signifies (a) such an alienation of the possession, whereby he, who has a right to the inheritance, cannot (b) enter, but is driven to his action.

Process and Error.—Co. Lit. 325. and note (1), *ibid.* 13th edition. (a) To every discontinuance it is necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. Co. Lit. 327. b. and 332. same rule. (b) But he, who claims by title paramount above the discontinuance, may enter. Co. Lit. 327.

[It began in the case of husbands' alienations of their wives' land. By the civil law, the father gave the *dowry*, which was the estate of the wife given on the marriage; and if it consisted of matter moveable, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life.

If it consisted of things immoveable, the husband could not alien without the consent of his wife, by the Julian law. And by Justinian's reformation, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominium civile penes maritum est, naturale penes uxorem.* Dig. li. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*]

Under this Head we shall consider,

- (A) Of Discontinuances made by Ecclesiastical Persons.
- (B) Made by Tenants in Tail.
- (C) By Husbands seised in Right of their Wives.
- (D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.
- (E) What Estate or Interest may be discontinued.
- (F) By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.

(A) Of Discontinuances made by Ecclesiastical Persons.

IN ancient days, abbots and prelates were supposed to be married to the church; and as husbands and representatives of the church, were allowed to have a fee in right of the church, that they might maintain actions, and hold courts within their manors and precincts; therefore at common law, a bishop, abbot, or any other person, seised in fee in right of his house or church, might have discontinued, and thereby put his successor to his action to recover the right of possession.

But as the right of property was in the church, the bishop could not alien without the consent of the chapter, who represented the clergy of the diocese; nor could the abbot alien without the consent of his house.

And at this day, by the 1 *Eliz. c. 19.* & 13 *Eliz. c. 10.* and 1 *Jac. c. 3.* neither a bishop, dean, master of an hospital, &c. can discontinue any of their possessions, or bar their successors of their right of entry.

As to parsons, vicars, prebendaries, and others who are representative, they were considered only as having a qualified right, and their estate by the common law only an estate for life, the fee being in abeyance; and therefore could not discontinue, or do any other act to the prejudice of their successors, though they could alien with the consent of the patron and ordinary *.

made upon benefices with cure are declared void.

If

Co. Lit.
325. b.
Comb. In-
cumb. 484.
Gilb. Ten.
102.

Co. Lit. 325.

Co. Lit. 325.
b. 342.
Roll. Abr.
633.

Co. Lit.
341. a.
Dyer, 239.
pl. 41.
Hert. 88.
* By 13 El.
c. 20.,
charges

2 Roll.
Abr. 58.
But for this
side under
head of
Leases and
Terms for
Years,
Leases made by Ecclesiastical Persons.

If a bishop leases parcel of the demesnes of a manor for life, not warranted by the statute of 1 Eliz. c. 19. and after leases the manor to another for life; the parcel so leased shall pass with attornment of the first lessee; for the said lease did not make any discontinuance, but the reversion thereof continued parcel of the manor.

(B) Of Discontinuances made by Tenants in Tail.

Lit. § 598.

(a) Also,
the entry
of the issue
is taken
away, be-
cause the

If tenant in tail makes a *feoffment* in fee; this is a discontinuance, for he has the right of possession inheritable in him; for although the statute *de donis* preserves the right of the inheritance to the issue; yet it does not preserve the right of possession, and (a) therefore the issue is put to his action.

feoffment had anciently a warranty annexed unto it, which defended such right of possession; and when a man had a warranty to cover his possession, it was not fit he should be put out of possession by any act in *pais*, without bringing in his warrantor by voucher; and therefore the entry was disallowed in such cases, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia chartæ*. Co. Lit. 327.

13 H. 7.

22. b.

Roll. Abr.

633.

So, if tenant in tail, remainder to his right heirs, makes a *feoffment* in fee; this is a discontinuance.

Cro. Car. 387. 405, 406. Jon. 358. Hut. 126. S. C. and S. P. admitted.

Lit. § 598,

599. 3 Co.

85. S. P.

But Q. after

such release,

what estate

or interest

the disseisor has;

If tenant in tail be disseised, and *release* to the disseisor all his rights; this works no discontinuance; for a *release* being a conveyance in secret cannot pass the possession; and therefore a conveyance, that cannot pass the possession, cannot pass the right of possession.

and Saund. 261.

Lit. § 601.

3 Co. 85.

S. P.

(b) So that

it is not the

warranty

only that makes

the discontinuance,

but the warranty

and descent upon

him that hath

right to the lands.

Co. Lit. 328. a.

(c) *Viz.* That

if assets descend,

he to whom the

release is made

may plead the same,

and bar the demandant.

But if tenant in tail being disseised releases all his right to the disseisor, and binds himself and his heirs to warranty, and dies; and the warranty descends (b) upon the issue in tail, this is a discontinuance, (c) by reason of the warranty.

only that makes the discontinuance, but the warranty and descent upon him that hath right to the lands. Co. Lit. 328. a. (c) *Viz.* That if assets descend, he to whom the release is made may plead the same, and bar the demandant. Co. Lit. 328. a. b.

Co. Lit.

332. a.

Bull. 162.

2 Roll.

Rep. 484.

(d) But if

tenant in tail

levies a fine

for continuance

de droit tantum,

this is not any

discontinuance

till execution;

for if he dies

before execution,

the tenant may

enter. 36 Aff. 8.

Roll. Abr.

632. S. C.

So, if a fine

If tenant in tail leases for years, and after levies a fine, this is a discontinuance, for fine is a *feoffment* upon (d) record, and the freehold passes.

(d) But if tenant in tail levies a fine *for continuance de droit tantum*, this is not any discontinuance till execution; for if he dies before execution, the tenant may enter. 36 Aff. 8. Roll. Abr. 632. S. C. So, if a fine be levied to tenant in tail, and he grant, and render the land to the conuzor and his heirs, and die before execution, this is no discontinuance; otherwise, if executed in the life of tenant in tail. Co. Lit. 333. b.

Co. Lit. 332.

But if tenant in tail leases for his own life, and after levies a fine, this is no discontinuance, because the reversion expectant upon an estate of freehold, which lies only in grant, passed thereby.

If tenant in tail leases for the life of the lessee, by this the tail and reversion thereupon is discontinued; and if the tenant in tail by deed grants his reversion in fee to another, and the tenant for life attorns; and (a) after the tenant for life dies, (b) living the tenant in tail, &c. (c) this is a discontinuance in fee.

Lit. § 620.
(a) So, if tenant for life surrenders to the grantee, or the grantee

recovers in waste, and enters for the forfeiture, &c. Co. Lit. 333. b. Lit. § 621. 629. Jon. 210. Latch. 65. (b) If tenant in tail leases for the life of the lessee, and after levies a fine with warranty; though this is not any discontinuance, so as to take away the entry of him in reversion after the death of the tenant for life, unless executed in the conveyance by the death of tenant for life in the life of tenant in tail; yet the grantee hath an absolute fee, to which the warranty being annexed, and descending upon the reversioner, will be a bar. Jon. 210. adjudged. Cro. Car. 156. adjudged. For by the estate for life the tail was discontinued, and a new fee gained; which reversion in fee being granted with warranty, the warranty was annexed to the fee, and bound those that had right. Vide Latch. 64. 72. Salk. 245. Lutw. 770. 782. (c) Where the reversion is executed in the life of tenant in tail, it is equivalent in judgment of law to a feoffment, for the estate for life passed by livery. Co. Lit. 333. b.

If tenant in tail leases for (d) life, the remainder in fee, this is an absolute discontinuance, though the remainder is not executed in the life of tenant in tail, because all is but one estate, and passeth by one livery.

Co. Lit. 333. b.
(d) So, if he leases for years, the

remainder in fee, and makes livery of seisin accordingly. Lit. § 631.

But if tenant in tail leases for three lives, according to 32 H. 8. c. 28. this is no discontinuance of the estate-tail, or of the (e) reversion, (f) because it is authorized by act of parliament, wherein every man's consent is involved.

Co. Lit. 333. a.
But for this wide head of Leases.
(e) But if

tenant in tail levies a fine, and after dies without issue, the donor is put to his formedon. Co. 96. Cro. Jac. 696. Sid. 83. (f) Dyer, 57. pl. 1. Owen, 28. 2 Leon. 46.

4 Leon. 191.

If tenant in tail leases for life, and after disseises lessee for life, and makes a feoffment in fee, and the lessee dies, and then tenant in tail dies, though the fee was executed, yet, because it was not executed by (g) lawful means, it is no discontinuance.

Co. Lit. 333. b.
(g) Where by custom an infant above the

age of 15 may make a feoffment, and being tenant in tail, he makes a feoffment; it is no discontinuance, because the custom will not enable one to do a tort. Cro. Jac. 80.

If there be tenant for life, remainder in tail, remainder in tail, &c. and tenant for life, and he in the first remainder in tail levy (b) a fine, this is no discontinuance of either of the remainders, because each of them passed only what he lawfully might.

Co. 76. a.
Co. Lit. 302. b. Cro. Eliz. 827.
Moor, 634.
Owen, 129.

vide 2 Lev. 254. 2 Jon. 58. (b) So, if they made a feoffment. Co. 76. Cro. Eliz. 135. Leon. 127. But 2. and vide Dyer, 324. And. 286. Cro. Eliz. 36. 6 Co. 15. and Sid. 83., where this opinion is denied; because a feoffment differs in its nature from a fine. — If such feoffment be made by parcel, it will be the surrender of tenant for life, and the feoffment of him in remainder, *ut res magis valens*, and, consequently, a discontinuance. Co. 77. — But a naked consent of the tenant for life will not amount to a surrender, so as to make it a discontinuance. Carth. 110.

If tenant in tail enfeoff the donor, this is not any discontinuance, because the donor hath the (i) immediate estate, and it operates as a surrender; it passes no more than it lawfully may pass.

Lit. § 65.
Co. 140. S. P.
(i) But if there be tenant in tail.

the remainder in tail; and the tenant in tail enfeoff him in reversion in fee, this is a discontinuance, Co. 140. Co. Lit. 335. S. P. because there is a mesne estate. Keilw. 42. a. S. P. per Frowick and Dyer 10. pl. 32.

Co. Lit. If the donee enfeoff the donor and a stranger, (a) this is a discontinuance of the whole land.
 355. a.
 (a) Conditionally, viz. if the stranger survive. Dyer. 12. pl. 53. Cro. Car. 406.

Lev. 36. If a man covenants to stand seised to the use of himself for life,
 Stephens remainder to his wife for life; the remainder to the heirs male
 and Bit- which he shall beget on the body of his wife, remainder to his
 tridge. eldest son by a former wife, &c. and after the husband and wife
 Raym. 36. levy a fine with warranty, and die without issue; this is no dis-
 S. C. continuance of the remainder, because the estate-tail was not exe-
 Sid. 83. cuted, by reason of the intervening estate limited to the wife,
 S. C. ad- which estate is not drowned, but remains distinct.
 judged.
 But it was agreed, that if the estate-tail had been executed, this fine had been a discontinuance of the remainder in tail, and so the warranty descending upon him in remainder, would have barred.

Lit. § 637. If a man has the right of possession, and is not possessed by
 641. virtue of the entail, he cannot discontinue otherwise than by
 Carth. 110. (b) warranty.
 S. P. post. letter (E). (b) As if tenant in tail is disseised, and dies, and the issue in tail releases to the disseisor with
 warranty, though the issue was never seised by force of the entail, yet it hath the effect of a discontinu-
 ance by reason of the warranty. Co. Lit. 339. Dyer 55. Moor 256.

Lit. § 638. As, if there be grandfather, father, and son, and the grand-
 Roll. Abr. father be seised in tail, and the father disseise the grandfather, and
 634. make a feoffment in fee, and die, this works no discontinuance,
 Raym. 37. because the father was not possessed of the entail, but of a fee-
 simple by disseisin, which was subject to the entry of the tenant
 in tail; and, consequently, the alienee is subject to the entry of
 the issue in tail, inasmuch as the father, who made the alienation,
 had only the naked possession by disseisin, and not the right of pos-
 session by virtue of the entail.

Lit. § 638. So, if tenant in tail lease to one for life, and have issue and die,
 (c) So, and the reversion descend to the issue, and the issue (c) grant the
 though the reversion to another in fee, and the tenant for life attorn, and die,
 grant had and the grantee enter, and be seised in fee in the life of the issue,
 been with and the issue in tail have issue a son, and die, this is no discon-
 warranty. tinuance; but the son may enter, &c. for that his father had
 Co. Lit. never any thing in him by force of the entail.
 339.; yet
 vide Jon.
 210. Cro. Car. 156. Latch. 62.

Roll. Abr. So, if there be tenant for life, the remainder in tail, and he
 634. & vide in remainder enter upon the lessee, and disseise him, and make a
 2 And. 110. feoffment over, this is not any discontinuance, because he was
 Roll. Rep. never seised by force of the entail.
 188.
 Moor, 747. Styl. 158. Bullt. 162.

Roll. Abr. But if there be lessee for years, the remainder in tail to J. S.
 634. and (d) J. S. enter upon the lessee, and make a lease for life, or
 (d) So, if he feoffment in fee, (e) this is a discontinuance, for he was seised
 make a deed by force of the entail at the time of the feoffment.
 of feoff-
 ment with
 a letter of attorney to J. N., to make livery, and he enter and oust the lessee, &c. Moor 91. pl. 226.
 Dyer 363. pl. 22. (e) Though the lessee re-enter. Moor 281. pl. 6.

(C) Of Discontinuances by Husbands seised in Right of their Wives.

ANY alienation made by the husband of the wife's land, whether by feoffment, or fine, was a discontinuance, and after his death, she was put to her *cui in vita* to reinstate herself. 2 Inst. 681.

But now by the 32 H. 8. cap. 28. "No fine, feoffment, or other act, made, (a) suffered, or done by the husband (b) only, of any manors, &c. being (c) the (d) inheritance or freehold of his wife, during the coverture, shall make a discontinuance thereof, or shall be prejudicial to the (e) wife or her (f) heirs, or to such as (g) shall have right, title, or interest to the same by the death of such wife; but that the (h) wife or her heirs, and (i) such other to whom such right shall appertain after her death, may enter into such manors, &c. according to their rights and titles therein; any fine, feoffment, or other act of the husband notwithstanding; fines levied by the husband and wife (whereunto the wife is party and privy) only excepted." (a) The husband causes a *præcipe* to be brought against him and his wife upon a feigned title, and suffers a recovery without any voucher, and execution to be had against him and his wife, this is an act within the statute, suffered by the husband. Co. Lit. 326. (b) Though a feoffment be made by the husband and wife, for this in substance is the act of the husband only. Co. Lit. 326. a. (c) Where during the coverture lands are given to the husband and wife, and the heirs of their two bodies, this is the inheritance of the wife within the act; so that if the husband makes a feoffment, and dies, she or her issue may enter. 9 Co. 138. 2 Inst. 681. Cro. Car. 477. Co. Lit. 326. 2 Inst. 681. 8 Co. 72. Brown. 131. —But if the husband levies a fine with proclamations, the issue is barred, though the wife is helped by this statute. Keilw. 205. 213. Dyer, 351. pl. 24. And. 39. 8 Co. 72. —But if the husband is tenant in tail, remainder to the wife in tail, and the husband makes a feoffment in fee, if the husband die without issue the wife may enter. Co. Lit. 326. a. 8 Co. 72. But there said, if he suffers a recovery, she is barred. (d) This extends not to the wife's copyhold of inheritance. Moor, 596. —But though the statute does not extend to it, yet the husband cannot at common law discontinue the wife's copyhold. 4 Co. 23. Cro. Jac. 105. Poph. 138. Moor, 596. Roll. Abr. 632. (e) If after a feoffment made by the husband they are divorced *causa præcontractus*, she may enter within this act, and is not driven to her *cui ante divorcium*, as at common law; though by the statute the entry is given to the wife, and now upon the matter she was never his lawful wife; yet at the time of the alienation she was his wife *de facto*; and where the husband dies, she is not his wife at the time of the entry. Co. Lit. 326. a. 8 Co. 73. a. She may enter though her husband is living, but *vide* Moor, 58. pl. 164. (f) But her heirs by the common law could have no remedy, nor by this act can enter during the life of the husband. Co. Lit. 326. 8 Co. 72, 73. (g) But if the wife before entry dies without heirs, the lord by escheat shall not enter; for though an entry is given by the act, yet the feoffee, &c. is in by title as before. Hob. 243. 261. (h) But if the husband makes a feoffment, and dies, and the wife before entry levies a fine, this so strengthens and fortifies the discontinuance, that she or those in remainder can never enter; and though, by the statute it is enacted, that the feoffment of the baron shall not be a discontinuance, but the wife may enter, yet it is a discontinuance till entry. 2 Roll. Rep. 311. Cro. Car. 320. and *vide* Roll. Abr. 632. (i) By these words the entry of him in reversion or remainder is preserved. Co. Lit. 326. Hob. 261.

Although the words of this act are very general, and seem to give the wife and her issue an entry, to avoid any fine levied by the husband of her lands, yet if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by the wife, her entry is not only taken away, but her right is for ever extinguished; because the statute was intended to provide only against the discontinuance, which was a grievance particular to feme coverts, but not to invalidate fines duly levied, according to 4 H. 7. c. 24. as to femes covert; because they by that statute have a remedy in common with others, which is by entry

(a) The husband causes a *præcipe* to be brought against him and his wife upon a feigned title, and suffers a recovery without any voucher, and execution to be

Co. Lit. 326. Dyer, 72. 162. 191. Plow. 373. 8 Co. 72. 2 Inst. 681. 9 Co. 140.

or claim to avoid the fine; whereas before the statute of 32 H. 8. c. 28. it was not in their power to prevent the discontinuance; and therefore the statute relieves them in that particular. Besides, though the words of the act be general, that such fine shall not be prejudicial to the wife of her heirs, yet the following words, *viz. but that she may lawfully enter according to her right and title therein*, are explanatory, and allow her an entry only in cases where she had a right before the statute, and it is plain that by 4 H. 7. c. 24. she had no right after the five years were lapsed from the death of the husband.

Co. Lit. 326.

3 Co. 71. b.

(a) If lands are given to baron and feme, and the heirs of the body of

the baron, and the baron makes a feoffment in fee, this is a discontinuance; for the baron is seised by force of the entail. Cro. Car. 320. Jon. 324. 3 Co. 5. Roll. Abr. 632, 633. 2 Roll. Rep. 311.

If husband and wife are tenants in (a) special tail, and the husband aliens in fee, this is a discontinuance, for though the words of the statute are, *of any lands being the freehold and inheritance of the wife*; yet as this joint estate may without any impropriety be called the inheritance of the wife, the mischief being equal, it shall be intended to be provided against.

2 Inst. 681.

If a husband levies a fine of the wife's lands to the king, she may after the death of her husband enter upon the king; for though the statute does not expressly name the king, yet being made to prevent an injury and wrong, he shall be bound by it, the rather because it is his most immediate concern to relieve his subjects from any grievance or wrong.

(D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.

Dan. Abr. 579.

THE learning hereof depends upon the statute 11 H. 7. c. 20. which provides against discontinuances and disseisins by the wife, to the prejudice of the heir of the husband, and seems to be well explained by the following notes and observations of Mr. *Danvers*.

(b) So, if a woman, having only title of dower, enters before she is endowed, and levies a fine. 2 Leon. 160. 3 Leon. 78. cited by Rhodes to have been adjudged.

(c) But this extends not to estates in fee. Dyer 248. pl. 73. 4 Co. 3.

By 11 H. 7. c. 20. "If any woman having an (b) estate in dower, or for life, or (c) tail jointly with her husband, or only to herself, or to her use in any manors, (d) &c. of the (e) inheritance or (f) purchase of the husband, or (g) given to the husband and wife in tail, or for life, by any ancestor of the husband, or other person seised to the use of the husband, or his ancestor, and being sole, or with (h) other after taken husband (i) discontinue, (k) alien, release, or confirm with (l) warranty, or by covin suffer (m) any recovery against them; all such recoveries, discontinuances, &c. shall be (n) void, and (o) every (p) person to whom the interest, &c. after death of the woman, in manors, &c. should belong, may enter, &c. as if no discontinuance, &c. had been; and if such husband and wife make such discontinuance, the (q) person to whom the manors, &c. should belong after the death of the woman, may enter and hold, according to such title as he should have had, if the wo-

"man

“ man had been dead, and no discontinuance, &c. as against the
 “ husband during his life ; provided the woman after the death of
 “ her husband may re-enter, &c. but if sole when the discontinu-
 “ ance, &c. she shall be barred for ever, and the person, to whom
 “ the interest belongs, may enter, &c. *Provided* the act shall
 “ not extend to any recovery or discontinuance, to be had (r)
 “ with the (s) heir next inheritable, nor where he, that next
 “ after the death of the woman should have an estate of inherit-
 “ ance, shall be assenting to the said recovery, where the assent
 “ is of record or enrolled.”

Moor 716.
 pl. 1000.
 Bridg. 136.
 Cro. Eliz.
 524. adjudg-
 ed. For it
 may go to a
 collateral
 heir. (d) Ex-
 tends not to
 copyholds.
 2 Sid. 41.
 73. adjudg-
 ed. [But it

does to a use or an equity of redemption, for uses are here expressly mentioned, and a trust is now, what
 a use was then. 2 Vern. 489. 1 Ab. Eq. 220.] (c) If one seized in the right of his wife levies a fine,
 and the conferee grants and renders the land to the husband and wife in special tail, the remainder to the
 heirs of the wife, and they have issue, and the husband dies, and the wife takes another husband, and
 they levy a fine, this is directly within the words, but out of the meaning of the act, because the estate of
 the land moved from the wife. Co. Lit. 366. a. Easton and Stud. Plow. 459. adjudged. Keilw. 214.
 adjudged. N. Bendl. 230. pl. 266. and with this agrees Cro. Eliz. 524. Moor 715. pl. 1000. Nay
 Cro. Eliz. 2. it is said to have been adjudged, if baron and feme levy a fine of such land, and the conferee
 grants a rent to them in tail, it is out of the act, for the rent is in lieu of the land. — So, if the an-
 cestor of the baron makes a feoffment in fee, upon condition that the feoffee shall give it to the baron and
 feme in tail, &c., this is within the meaning of the act, though out of the words, for they are in by the
 feoffment, and not by the ancestor of the baron. Moor 93. pl. 231. Per Pownden said to have been
 so adjudged, Linch and Spencer, Cro. Eliz. 514. 2 And. 44. Moor 455. 3 Co. 50. — It is
 within the act, though the gift by the husband or his ancestors, by which the feme takes, was made as
 well in consideration of money paid by the feme, or her father, as of the marriage. Dyer 146. a. b.
 Keilw. 208. Moor 93. pl. 231. Cro. Jac. 474. — Otherwise, if the lands had moved from the
 ancestor of the feme, as, if settled by the father of the feme in consideration of the marriage, and of
 money paid by the baron for the lands moving from her father, it shall be intended that her advance-
 ment was the principal cause of the gift, and not the money. Kynaston and Lloyd, Cro. Jac. 614. ad-
 judged. Jon. 13. adjudged. Palm. 213. 218. adjudged, Copland and Pyot. Cro. Car. 244. adjudged,
 Jon. 254. adjudged, and vide Moor 93. pl. 231. 2 And. 45. — But where conveyed by a stranger
 in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the
 baron; this is the purchase of the husband within the act. Moor 250. pl. 398. — If A. in con-
 sideration of good service done by B., conveys lands to B. his man, and C. his cousin, and the heirs of
 their bodies, &c. This is not within the act, not being made by the baron or his ancestor, and being
 in consideration of service done, it is not such a purchase as the act intends. Ward and Warthlew, Cro.
 Jac. 173. adjudged; and though C. was named cousin by the deed, it was said that was not material, be-
 cause it did not appear to be any part of the consideration; but however being found in fact that he
 was his cousin, and that a marriage was intended; it was said it should be presumed the marriage was
 as well the cause of the gift as the service. Noy, 122. adjudged. Yelv. 101. adjudged. Moor 683. pl.
 943. adjudged. (f) Baron and feme being joint copyholders in fee, the baron purchases the freehold
 thereof to him and his wife, and the heirs of their bodies, they have issue, the baron dies, and the feme
 enters and suffers a recovery, &c., this is a forfeiture within the act, for the copyhold by the acceptance
 of the new estate, was extinct. Cro. Eliz. 24. agreed per cur. (g) If a man devises lands to his wife
 in tail, this is within the words, but not within the meaning of the act. Folter and Pitfall, Leon. 261.
 Cro. Eliz. 2. [Hughes v. Clubb, Com. Rep. 369. S. P.] (h) A man seized in fee levied a fine to the
 use of himself for life, and after to the use of his wife, and the heirs male of her body, by him begotten,
 for her jointure; and after he and his wife levied a fine, and suffered a recovery, and the husband and
 wife died; and it was held, the issue upon this act might enter, for though it was not within the words,
 yet it was within the remedy intended to prevent the dissemination of heirs. Co. Lit. 365. But in the case
 of Kirkman and Thompson, Cro. Jac. 474. this point is adjudged con. and that such alienation was nei-
 ther within the words nor intention of the act, which seems clearly to be law. (i) Vide Jones and
 Philpot, Lev. 49. Sid. 67. (k) If such feme tenant in tail accepts a fine *sur convenance de droit*, and
 thereby renders the land for 1000 years, &c. this is an alienation within the act, else it would be to little
 purpose. 3 Co. 51. said to have been so resolved. Moor 250. pl. 398. adjudged. 2 Leon. 168. ad-
 judged. 3 Leon. 78. adjudged, & vide Cro. Eliz. 514. 2 And. 58. — Diversity where such lease
 made by fine, where by deed only. Cro. Jac. 629. Bridg. 28. 1 Jon. 60. & vide 2 Roll. Rep. 490.
 Where it is said by two judges, that though such lease be made by fine, yet it not being any discontinu-
 ance, or prejudicial to the issue, he cannot enter till after her death. (l) This relates only to releases
 and confirmations, which are no discontinuance without, so that a lease by such feme tenant in tail made
 for three lives without warranty, if not pursuant to 32 H. 8. c. 28. is a forfeiture within the act. Sir
 George Brown's case, 3 Co. 50. b. Cro. Eliz. 514. (m) Extends to such, where she comes in only as
 vouchee. Moor 716. pl. 1000. (n) Yet it continues as to the parties, and all others, except him to
 whom the interest, &c. by whose entry it is to be avoided. 3 Co. 49. b. 60. Hob. 166. (o) Unless
 he hath disabled himself by levying a fine, suffering a recovery, &c. Ward and Warthlew, Cro. Jac. 175.
 adjudged.

adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. — And where he hath concluded himself by suffering a recovery, &c., his issue whom he had power to bar shall not enter. Lincoln College, 3 Co. 61. 2 And. 31. — But if after such feme tenant in tail suffers a recovery, the issue in tail releases to the recoveror, yet the issue of that issue is not barred thereby. 3 Co. 59. cited from Doctor and Student, and 3 Co. 61. agreed to be law. — But, if the issue in special tail, the remainder being to him in fee, levies a fine with proclamations, (though not found,) and after his mother (being tenant in tail within this act) leases for three lives, (not warranted by 32 H. 8. c. 28.) living the issue, the conveyance may enter; for the tail was extinct by the fine, and the conveyance was the person to whom the interest, &c. belonged after the death of the woman. Sir Geo. Brown's case, 3 Co. 51. adjudged. Cro. Eliz. 514. adjudged. Moor, 455. adjudged. 2 And. 44. adjudged. And there said that the record of the fine being in the same court, they might inspect it to see the proclamations. Roll. Abr. 878. pl. 7. 3 Co. 61. But if the reversion in fee had been in another, then the conveyance taking nothing by the fine, but by estoppel, could not enter; nor could the heir, because concluded by the fine. Ward and Walthoe, Cro. Jac. 175. adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. But in this last book the case is not fully stated, for there is no notice taken of the last fine levied by the woman alone after the death of her second husband, which made the forfeiture. (p) The statute intended only to prevent such prejudice as might arise to the heirs of the baron, by whom advanced, and not where the immediate interest upon the death of the wife was so limited, as to belong to a stranger. Foster and Pittsall, Cro. Eliz. 2. Leon. 261. [Hughes v. Clubb, Com. Rep. 569. S. P.] (q) But if such woman be tenant for life—remainder for life, remainder in fee; and two tenants for life join in a feoffment, the entry of him in remainder in fee is lawful by this act, *per* Leon. 262. But this seems to be such a forfeiture, for which the remainderman in fee might by the common law enter. Co. Lit. 251. b. (r) If the baron, being seised to him and his feme, and the heirs of the body of the feme, dies, and in the life of the wife his issue (then being tenant of the freehold, as pleaded, which must be intended by disseisin, no surrender or forfeiture being alleged) suffers a recovery, (which binds not the tail, he being in of another estate,) by agreement that the recoverors should enfeoff J. S., and that the wife should release to him with warranty, which she does accordingly, and dies, and the warranty descends, &c., this shall bind; for not being prejudicial, but intended to perfect the assurance of the heirs, it is not restrained by this act; for the woman, joining with the heir by fine or recovery, might have barred the tail; and it was never intended to prevent a warranty being made to him that had the land, by the conveyance of the heir himself. Lincoln College's case, 60. a. b. adjudged. (s) But if such heir being a daughter joins, and after a son is born, he may enter. 3 Co. 61. b.

[By stat. 32 H. 8. c. 36. § 2. it is enacted, that no fine levied by any woman of any such estate as is mentioned in the above statute, 11 H. 7., shall be of any effect.]

(E) What Estate or Interest may be discontinued.

Lit. § 627, 628. Co. Lit. 327. 3 Co. 85. (a) Tenant in tail of an advowson in gross grants the same in fee, and after, a collateral ancestor releases to the grantee with warranty, and dies, this is a good bar for ever. 1 Leon. 111. said by *Arden* to have been adjudged, but *vide* 2 And. 110. (b) But where the issue by bringing a *firmredo* admits himself out of possession, and shall be barred by the warranty and assets, *vide* Co. Lit. 332. b.

THERE can be no discontinuance of things which lie in grant; and, therefore, if tenant in tail of a rent, (a) advowson, common, or remainder, or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with (b) warranty; this is no discontinuance of the entail, for nothing passes but during the life of tenant in tail, which is lawful, but every discontinuance works a wrong.

Roll. Abr. 632. Co. Cop. 141. 4 Co. 23. a. (c) For a warranty is usually annexed to it; and if the rightful owner might enter, the benefit of the warranty would be lost, but warranty cannot be annexed to copyhold estates. Leon. 95. 352.

A copyhold estate cannot be discontinued by surrender, for the tenant gives up no more than he had, and the surrenderee is in by the lord's admittance; and this is not (c) like a feoffment at common law, which being so notorious a way of conveying estates, takes away the entry for the benefit of strangers, who otherwise would be at a loss to know against whom to bring their *præcipe*.

But

But by custom, a copyhold estate may be discontinued by surrender, and by such surrender an estate-tail in copyhold lands for ever.

Moor 358. 753. Leon. 95. Cro. Eliz. 50. 148. 4 Co. 25. Roll. Abr. 632. Brownl. 44. 79.

Also, if there hath been a custom in a manor, that plaints should be prosecuted there in the nature of real actions; if a recovery be had upon such plaint against tenant in tail, it is a discontinuance; for since the custom warrants the recovery, it is an incident to such a recovery by the common law, that it should be a discontinuance, which it seems is drawn from the nature of the thing, that a judgment given in a court of judicature ought not to be avoided, but by matter of as high nature, viz. a recovery by a court of justice, and not by the entry of the party that hath right.

If the reversion or remainder be in the king, the tenant in tail cannot discontinue the estate-tail,

3 Leon. 75. For this *vide* heads of *Fines* and *Recoveries*.

But if there had been tenant in tail, the reversion in the king, before 34 *E. 5* H. 8. c. 20. he might have (a) barred the tail by a common recovery, but that common recovery neither barred nor discontinued the king's reversion.

fine, without discontinuing the king's remainder, *vide* Moor 115. pl. 258. 2 Leon. 57. And. 64. Keilw. 213.

If *A.* being tenant in tail makes a gift in tail to *B.*, and *B.* makes a feoffment in fee, and dies without issue, and *A.* hath issue and dies, the issue of *A.* may enter; for though the feoffment of *B.* did discontinue the reversion of the fee-simple, which *A.* had gained upon the estate-tail made to *B.*, yet it could not discontinue the right of entail which *A.* had, which was discontinued before; and therefore, when *B.* dies without issue, the discontinuance of the estate-tail of *B.* which passed by his livery ceases, and consequently the entry of the issue of *A.* is lawful.

If husband and wife are seised of lands, remainder to the heirs of the body of the husband, with remainder over, they make a lease for years, not warranted by the statute, the husband dies, leaving issue *J. S.*, who at the age of 16, with the consent of the wife and second husband, with his own hands makes a feoffment to the lessee; this is no discontinuance of the remainder over, for *J. S.* had (b) only a reversion expectant upon an estate for life, and so (c) no freehold in him at the time of making the feoffment.

discontinue the estates therein. Carth. 110. *per Curiam*, *vide supra* letter (B). (c) For though the tenant for life consented, yet such a naked assent will not amount to a surrender. Carth. 140. *per Curiam*.

For this
vide Cro.
Eliz. 484.
717.

4 Co. 23. 2.
Cro. Eliz.
372. 380.
392.

Co. Lit. 335.
2 And. 156.
2 Leon. 157.

Co. Lit. 335.
(a) And
where such
tail may
now be
barred by
4 Leon. 40.

Co. Lit. 327.

Carth. 109.
Swirt and
Heath, ad-
judged.
(b) And it
is a maxim
in law, that
he who hath
no freehold
in the land
cannot by
any means

(F) By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.

Co. Lit. 325. a. **A** Man may discontinue by five sorts of conveyances, *viz.*
 (a) fine, recovery, (b) feoffment, release, or confirmation with warranty.
 (c) But if he dies before execution, it is no discontinuance. Roll. Abr. 632. Co. Lit. 333. b. (b) But a feoffment with livery in law works no discontinuance. Roll. Abr. 632.

Co. Lit. 328. b. A feoffment made by tenant in tail is a discontinuance, with or without warranty; but a release or confirmation is not, for a man can pass no more thereby than he may lawfully pass: but a warranty added to a release, or confirmation to a disseisor, works a discontinuance, if it descend on him that hath the right.

Co. Lit. 328. b. But if one having a son marry a second wife, and land be given to the husband in special tail, and he have issue by his second wife, and be disseised, and release with warranty, and die; or if tenant in tail of *borough-english* land have issue two sons, and be disseised, and release with warranty to the disseisor, and die; yet is not the entail discontinued in either case; because the warranty always descends to the heir at law.

Perk. § 294. If tenant in tail exchanges with another, (c) this is not a discontinuance.

Co. Lit. 332. b. S. P. Roll. Abr. 632. S. P. (c) Because no livery of seisin is requisite thereupon. Co. Lit. 332. b. Co. 44. b. — So, of partition between parceners. Co. Lit. 173. a.

2 Inst. 644. Moor, 42. If tenant in tail bargains and sells his lands in fee, this is no discontinuance, for only a freehold which determines within the compass of a life, passes.

9 Co. 96. b. So, if tenant in tail by indenture enrolled bargains and sells to Scymour's case. Bull. 162. *S. C.* [But in this case it was agreed, that if the fine had been levied before the bargain and sale was enrolled, it would have been a discontinuance. So, where a fine is levied in pursuance of a covenant in a prior conveyance, as, where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly; in this case, the lease, release and fine will be considered as only one assurance, and the fine will, therefore, operate as a discontinuance of the estate tail. Doe v. Odiarne, 2 Burr. 704.] (d) For every discontinuance it is necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. Co. Lit. 327. b. — But there may be a discontinuance, which turns the estate to a right, and yet does not take away the right of entry; and a warranty may bar where the reversion is only displaced, and turned to a right, though the right of entry is not taken away. *Vide* Salk. 245. *per* Powel J.

Co. Lit. 335. b. Some discontinuances are for life only; as when tenant in tail makes a lease for the lessee's (e) life: some are during the limitation of an estate-tail; as when tenant in tail makes a gift in tail: also, if he makes a lease for years, or for his own life, remainder in

in fee, with livery; this is a discontinuance in fee, because the estate in fee passes by the livery. tenant in tail within the statute

11 H. 7. c. 20., accepts a fine *come ceo*, &c. and grants and renders it for 500 or 1000 years, rendering the ancient rent, this is within the act; for though strictly a term for years can work no discontinuance, yet they are in equal mischief, and the statute would be useless if such leases were not within the remedy thereof, Moor 25. Piggot and Palmer. 3 Co. 51. b. Cro. Car. 689. 2 Leon. 168. Barker and Taylor. 3 Leon. 78. Dyer 148.

And none can make a discontinuance larger than the alienation of the tenant in tail, who made it; therefore, if *A.* tenant in tail make a gift in tail to *B.* and *B.* enfeoff *C.* and die without issue, *A.*'s issue may enter. Co. Lit. 327.

If the estate that caused the discontinuance is (*a*) defeated, the discontinuance is (*b*) defeated also. Co. Lit. 336, 337.

entry for a condition broken, or otherwise. 8 Co. 44. a. (*b*) But the reversion may be revested, and yet the discontinuance remain; as if a feme covert had been tenant for life, and the husband had made a feoffment in fee, and the lessor had entered for the forfeiture, the reversion was revested, and yet the discontinuance remained at the common law. Co. Lit. 335. a. (a) As by nothing more is acquired against the disseisee but a bare possession, though against all others a fee-simple.

Disseisin.

(A) What Acts amount to a Disseisin.

(B) What Persons are capable of committing such Disseisins.

(A) What Acts amount to a Disseisin.

A *Disseisin* is where a man enters into any lands or tenements, where his entry is not congeable, and *ousts* him who hath the freehold; so that it differs from an *abatement*, which is the entrance of a stranger into lands, of which an ancestor died seised before the heir has entered; so that there is not properly an actual ouster committed of the person that was seised of the freehold, as there is in case of a disseisin; but the entry of the person who has the title to the freehold is prevented. In like manner, a disseisin differs from an *intrusion*, which is when an ancestor dies seised of any estate of inheritance expectant on an estate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir a stranger interposes and intrudes, and so gets possession of the freehold; so that it is rather a prevention Lit. § 279. Co. Lit. 181. 277. and note, that by a disseisin nothing more is acquired against the disseisee but a bare possession, though against all others a fee-simple.

prevention of the heir's entry, than an actual ouster of him of his freehold.

Roll. Abr.
658.

If husband and wife purchase lands in fee, and then the husband is attainted of felony, and the king seizes the land, and afterwards the lord of whom it is held hath it, upon his suggestion, delivered to him out of the hands of the king, as his proper escheat; this is a disseisin of the wife who was jointenant with the husband, for the lord got possession of the freehold by his misrepresentation of the nature of the estate to the king, which being a manifest act of injustice and falsehood, the possession acquired by it must be looked upon as an acquisition of the same nature with a possession gained by open and avowed violence, and so a disseisin.

Roll. Abr.
659.

A man has a house, and locks it, and departs, and another comes to the house, and takes the ring of the house in his hand, and says, that he claims the house to himself in fee, without making any entry into it, this is a disseisin of the house; for the claim he made upon taking the ring into his hand, shews his intention in doing it to be a plain seisin of the entire freehold, and consequently a disseisin of the true proprietor; and his non-entry into the house, upon his seising it, will not qualify the intention of what he has done, since his seisin of part, in the name of the whole, gives him whatsoever an entry could have done, and therefore such an entry was not necessary.

Bro. Disseisin, 25.

A man has a mill, and *A.* turns the water that used to serve the mill, so that it cannot grind; this is a disseisin of the mill, for which an assize lies against *A.* for to deprive a man of the means he has of obtaining the profits of his freehold, is, in effect, to disseise him of his freehold.

Roll. Abr.
659. Bro.
Disseisin, 42.

If *A.* cuts trees in his soil, and *B.* who has common there, says that the soil is his, and commands him not to cut there, whereupon *A.* departs out of the land, this is no disseisin in *B.* for he who has no right to a freehold cannot be seised of it by bare words only, which are fleeting and transitory, and do not amount to such an act of notoriety and solemnity, as is required in gaining possession of a freehold, whereof strangers are to take notice.

Roll. Abr.
659.

If a man, who has right of entry into lands, in coming thither is disturbed and hindered from entering, this is a disseisin, such hinderance of entry being equivalent to an actual ouster of the freehold.

Roll. Abr.
659.

Where a man enters into my house by my sufferance without making any claim, this is no disseisin.

Bro. title
Disseisin, 28.

A man grants all his lands in *D.* to *A.* besides the chamber he lies sick in; and after livery made pursuant to the grant, by the sufferance of *A.* the grantor removes into the hall without claiming any thing to his own use, and dies; this coming into the hall is no disseisin, being by the permission of the grantee, and so not unlawful.

If the king be seised in fee of the manor of *B.*, and a stranger erect a shop in a vacant plat of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee, and the stranger continue in the shop, and occupy it as before, this is no disseisin; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession; for that the king's title appearing of record, the entry *in pais*, which is not an act of equal notoriety, will not devert it out of him: if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and, consequently, cannot be said to be disseised by the stranger who has made no entry upon him after the king's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it.

Roll. Abr.
659.
Hob. 322.
Bro. Dis-
seisin, 4.

So, if a man enters into certain lands, parcel of a manor which is in ward to the king, by reason of the nonage of *J. S.* and takes the profits as owner thereof, and *J. S.* after sues livery, and the intruder still continues in possession, and takes the profits as formerly, this continuance after the livery is no disseisin, but only an intrusion to be remedied by trespass or ejectment; and the manor being in the king only as guardian makes no difference; because, till it is relieved out of his hands, he is in actual possession of it as much as if it were his own.

Bro. title
Disseisin, 6.
Roll. Abr.
659.

Baron and feme seised in tail, the baron goes out of the country, and in his absence the feme enfeoffs *A.* in fee, [who enters,] this is a disseisin of the husband by *A.* because the feoffment by the feme covert was void, and so his entry under it tortious.

Bro. title
Disseisin, 24.

If a disseisor makes a lease for years, or at will, and the disseesee enters upon him, and then the lessee re-enters, claiming by virtue of his lease, though that was only a term for years, yet he is a disseisor, because he enters upon the proprietor of the soil, and ousts him of his possession, and that by virtue of a former disseisin, so that the possession of the freehold cannot be supposed to be left in the disseesee; and therefore, such an entry must be equivalent to an avowed disseisin.

Roll. Abr.
662.

If a man enters into my land, claiming a lease for years, or enters as tenant by statute merchant, when he has no right, he is a disseisor, the entry being unlawful, and the pretence of title unjust.

Roll. Abr.
662. Co.
Lit. 271. a.
Dyer, 134.
pl. 11.
Bro. title
Disseisin, 7.
1 Roll.
Abr. 662.

So, if a guardian in chivalry assigns dower to a woman, as wife of the deceased tenant, who in fact is not his wife, and she enters thereupon, she is a disseisores, for her false title being an act of fraud and injustice, and the possession acquired by it tortious, the pretence of title, when it appears that she has none, will not avail her; and *Q.* whether the guardian in this case is not a disseisor likewise?

A man makes a lease for years to another and his heirs, and the lessee dies, and the heir claiming the term enters; though the term being a chattel must go to the executors, and not to the heir, yet the heir is no disseisor, because he claimed only a term

Roll. Abr.
662.

and

and no freehold, and such a term too as was in being, and actually limited to him; and therefore the heir in this case, that is named in the words of limitation, shall be only presumed to enter on behalf of the executor, to continue the term that was in being, and not to commit a disseisin on the freehold.

Roll. Abr.
659. Pren-
son and
Sone.

If there be tenant by sufferance, and a stranger, who has no right to the land, make a lease thereof for years by indenture to the tenant, without making any entry upon such tenant, previous to the demise, and the tenant thereupon pay the rent reserved on this lease to the stranger, this is no disseisin of the rightful proprietor; for the tenant at sufferance was no disseisor before the demise; and after the demise, or by virtue of it, he can be no disseisor, because he still continued his old possession, without committing any actual ouster of him who had the freehold; for the acceptance of the deed of demise, and payment of rent thereupon, are not acts of sufficient solemnity and notoriety, since they may be transacted in private, to change the possession of a freehold.

Co. Lit. 57.
b. 271. a.
[(a) But on
the argu-
ment of the
case of
Blunden
and Baugh,
commonly
called Lord

If a guardian after the full age of the heir continues in possession, he is no disseisor, but an abator (a), and an assise of mortdancestor lies against him by the heir, for he does not actually oust the heir of his freehold, which is required in a disseisin, but holds him out by an *intermediate entry* between him and his ancestor, which makes the distinction between an abatement and disseisin.

Nottingham's case, Justice Barclay said, that he, whom Lord Coke calls in this place an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord Nott. MSS. Co. Lit. 271. a. n. (2), 13th edit.]

Roll. Abr.
661. Cro.
Car. 302.
Blunden
and Baugh.

If a man enters as guardian into the lands of an infant, who has no title to be guardian, it is at the election of the infant to make him a disseisor, on account of his wrongful entry upon an actual ouster of such infant, or else to dissemble the wrong, and call him to an account as guardian.

Bro. title
Disseisin,
34. 71.

An absolute feoffment is made by deed, and a letter of attorney therein to deliver seisin; the attorney makes livery upon condition; he is a disseisor of the feoffor, because not pursuing his commission it is all one as if he had none at all, and then his livery is tortious, and amounts to a disseisin.

Jon. 315.
Cro. Car.
303, 304.
Bro. title
Disseisin, 68.
Dalf. 46.

A. seised of lands in fee permits his son to enter into them by his consent, and to occupy as tenant at will; the son after by indenture leases them for 21 years, rendering rent: this was holden no disseisin, but at the election of the father, who may if he pleases call it such, because the lease for years was more than he could justify; but a disseisin being an actual ouster of another's freehold, the possession of the son, being in possession as tenant at will, gives room to the father to construe his demise no disseisin, if he thinks fit; and therefore, the son in this case shall be presumed to act in behalf of the father, and to demise the land as attorney to him, especially if the father afterwards demand and receive the rent, for the rule is, *Ratihabitio retrotrahitur et man-*

dato

dato equiparatur: however, the first lessor, before he hath received any rent, may take the demise to be a disseisin at his election; for when the tenant at will takes upon him to make a greater estate than he has himself, this may be construed a disseisin, because it is an usurpation upon the right of the lessor, and in effect a seizure of his freehold; and the great reason why the lessor is allowed to make the other construction, is to avoid the inconveniences which otherwise would follow; for if a lessor was obliged to look upon leases for years of his tenant at will to be disseisins; then if a tenant at will should make a lease for a small time, and the lessor not knowing thereof should levy a fine of such lands for his wife's jointure, or other uses, the lessee of tenant at will would be necessitated to become a wrong-doer, perhaps contrary to his intent, and the disseisee would be deprived by his fine of all remedy for recovering his right, as well as the person to whom he levied it; for he himself could not set up a title to such lands, because he had transferred it to another in a court of record, and the other could not claim, because a naked right cannot be transferred.

In this case, if the lessor takes such a disposition by his tenant at will to be a disseisin, then both the tenant at will and his lessee are disseisors, since they both concur to the act that is the disseisin; but in respect of all strangers the tenant at will only is to be esteemed tenant of the freehold, and the person who as such is disseisor; for as for the lessee of tenant at will, he in respect of all strangers, and likewise of tenant at will, has a fair and legal interest derived out of the inheritance of his lessor, and so cannot be tenant of the freehold jointly with his lessor, but must claim under him.

If a lessee for years, or at will, makes a lease for life, or a gift in tail, that creates a good lease, or a good gift in tail among themselves and all others, besides the first lessor, and as to him they are both disseisors, for they both clearly concurred in ousting him of his freehold, one by giving, and the other by receiving the livery, which passed the freehold.

Tenant at will, or for years, makes a feoffment in fee, and dies; his wife brings dower: the feoffee cannot plead that her husband was never seised; for since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee, the feoffor had an estate, though in regard to the disseisee he is to be considered as a wrong-doer.

If a man enters into the land of an infant by his assent, the infant may proceed against him at full age as a disseisor; for the contract made between them during the nonage of the infant may be considered by the infant as void, and, consequently, the entry by virtue of it may be esteemed illegal; or the infant, if he thinks it more for his advantage, may at full age ratify the contract between them, and so allow him as his tenant.

If A. be seised of lands in fee, and a stranger enter upon him by virtue of a lease for years, which is void, and pay rent to him, A. can

Cro. Eliz.
830. Shaw
and Barber
cont. Jon.
317. Cro.
Car. 302.

Jon. 317.
Cro. Car.
302.
Bro. title
Disseisin, 3.
64. 66.

Jon. 317.
Mat. Tay-
lor's case.
[Vide Cro.
Jac. 615.
1 Atk. 442.]

Roll. Abr.
661. Cro.
Car. 223.
Bro. title
Disseisin, 30.

Dyer, 173.
in margin.
Roll. Abr.

66r. Moli-
neux's case.
Dyer, 62.
pl. 33. cont.

Palm. 201.
Jon. 316.
Cro. Car.
222. Roll
Abr. 661.

A. can never proceed against him as a disseisor, for his acceptance of rent at his hands is a full and uncontestable allowance of the lease he claims, and, consequently, the entry by virtue of it purged and made rightful.

A. bargains and sells lands by indenture enrolled to *B.* upon condition that on the payment of 300*l.* at the end of three years it shall be void, and that in the mean time the bargainee should not meddle with the profits of the land: the bargainor occupies, and makes a lease for five years, and at the day does not pay the 300*l.* the bargainee does not enter, but (the bargainor occupying it) devises the land: it was adjudged a good devise, for the bargainor in this case was tenant at will; and, therefore, his lease does not put the bargainee under the necessity of being a disseisee.

Roll. Abr.
659.

If a guardian by nurture makes a lease by indenture to one who is already in under the title of the infant, rendering rent to the guardian, which is paid accordingly; this is no disseisin, for there is no actual ouster consequent on such demise; and the rent paid to the guardian must be accounted for to the infant.

Taylor v.
Horde,
1 Burr. 60.
5 Br. P. C.
247. Cowp.
689. See
Co. Lit. 330.
b. n. 1.
13th edit.
where the
law of the
case is ques-
tioned with
great ability.

[*A.* tenant for life, remainder to *B.* in tail; *B.* recovers in ejectment against *A.* and has an *habere facias possessionem*, and whilst in possession makes a feoffment of the estate to *D.* with livery of seisin, that he might become tenant of the freehold, in order for the suffering of a common recovery. A recovery is accordingly suffered, and afterwards *A.* brings an ejectment, and obtains a verdict. It was adjudged, that *B.* by his entry in this case under the judgment was not an actual disseisor, and therefore had not in him any estate of freehold; and that the feoffment gave *D.* an estate of freehold only at the election of *A.* but did not give him an actual estate of freehold.]

Lit. § 278.

If two or more disseise another of any lands to their own use, they are all jointenants, and all disseisors; but if they disseise another to the use of one of them only, he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin.

Co. Lit. 180.
Roll. Abr.
663. Bro.
tit. Dis-
seisin, 12.
40. 45.

There are others who are called counsellors and commanders in a disseisin, viz. when any person counsels or commands another to disseise a third person; here we are to take notice, that though the persons that concur in a disseisin have these several names given them from the nature of that part of the disseisin that they commit, yet co-adjutors, counsellors, and commanders, are disseisors in respect of the person disseised, as well as the person to whose use the disseisin is made, and all equally liable to the assise of the disseisee; nay, though the disseisor, who is tenant of the land, dies, yet the assise lies against the co-adjutors, counsellors, &c. and tenant of the land, although he be no disseisor; and this is a most equitable proceeding; for since they all concur in committing the injury, it is but reasonable they should all answer for it; and though the person, that succeeds the disseisor that was tenant in the tenancy, had no hand in the disseisin, yet, claiming under it, he must be liable to the remedy the law gives the disseisee for recovering his right.

A man makes a lease for life, rendering rent, and goes into foreign parts; tenant for life dies, and *A.* counsels *B.* who is not heir to the lessor, to enter, who does it accordingly, and enfeoffs *A.* the counsellor; the lessor returns, and is hindered to enter by *A.*, whereupon he brings his assise against *A.* without naming *B.*, and well; for *A.* by his counsel is a disseisor, and being tenant of the land, and the person who disturbed the lessor of his entry, the lessor who was absent when the disseisin was committed, and so unacquainted with the manner of it, is not obliged to bring his remedy against any other but the person who is actually in possession, and defends that possession with force and violence.

Bro. tit.
Disseisin, 37.

A. disseises one to the use of *B.*, who knows not of it, and *B.* afterwards assents to it; in this case, till the agreement, *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them are disseisors.

Co. Lit.
180. b.
Bro. tit.
Disseisin, 59.

A man disseises tenant for life, to the use of him in reversion; and after he in the reversion agrees to the disseisin: by the better opinion, he in the reversion is a disseisor in fee; for by the disseisin made by the stranger, the reversion was divested, which cannot be revested by the agreement of him in reversion, for his agreement to the disseisin makes him a party to it; and therefore if he gets any thing by such agreement, he must get it as a disseisor; and so in this he is not seised of his old estate, but of an estate by disseisin.

Co. Lit.
180, 181.
[Why disseisin of tenant for life makes a fee in the disseisor is thus accounted for by Lord Hobart:]

"A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but a special occupancy, as is resolved in Chudleigh's case. But a disseisin of an estate for life by necessity in law makes a *quasi* fee; because wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules." Hob. 325.]

The demandant and others, in a *precipe*, disseised the tenant to the use of others, and the writ did not thereupon abate; for though the demandant was a disseisor, yet he gained no tenancy in the land, being only a co-adjutor, and so his remedy to gain the freehold still continues; for the design of such remedy being to recover the freehold, till that be obtained there is no reason to abate it; and that is not obtained by the disseisin, for he gains no freehold by it, so that the writ must still continue.

Co. Lit. 180.

If a man commands *J. S.* to enter into certain lands in his name, provided he has a right to them; if *J. S.* enters accordingly, yet if the commander has no right to the lands, he is not the disseisor, but *J. S.* only, for *J. S.* was not absolutely commanded to enter, but only conditionally, if the commander had right; so that it was incumbent on *J. S.* to enquire into the commander's title before he entered; and the commander having no title, the entry of *J. S.* was his own act, and not the execution of the command.

Roll. Abr.
663. Bro.
tit. Dis-
seisin, 57.

For the same reason, if a man says to *J. S.* that his ancestor died seised of certain lands, and thereupon commands him to enter into those lands in his name, if his ancestor died seised in fee, otherwise not; and thereupon *J. S.* enters, and yet the ancestor did not die seised in fee; *J. S.* is the sole disseisor, and the commander has no share in it.

Roll. Abr.
663.

Bro. tit.

Disseisin, 15.

If a man says to me, that he will disseise *J. S.* to my use, and I tell him that I am content; this does not amount to a command, but is only a sufferance of what is to be done, and so does not make me a disseisor, without an actual command; but he only that ousts *J. S.* is the disseisor.

Dyer, 141.

pl. 47.

A disseisor makes a lease for years, and the termor enters, the disseisor after leaves the kingdom, and at his departure commands his termor, that if the disseisee enter upon him, not to suffer him to continue in possession, but to maintain the possession against him as termor of the disseisor; the disseisee enters on the termor in the absence of the disseisor, and the termor re-enters, ousts him, and pays his rent after to the use of the disseisor, being absent; it seems the lessor is party to this second disseisin, though he did not expressly agree to it after it was done, for the precedent command and instructions sufficiently shew his intent and concurrence to it.

Roll. Abr.

663. Floyd

and Bethell.

A man recovers several houses in an assize, and after the tenant reverses the judgment in a writ of error, and a writ issues thereupon to the sheriff to put him in possession of those houses; in this case, though the tenants are strangers to the recovery, and therefore ought not to be ousted without a *sci. fa.* yet if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the court, which he is sworn to obey, under the penalty of being fined, if he does not.

Roll. Abr.

664.

The same law in all cases where execution is of a judgment wherein the demand is made of a thing certain: but if an execution is to be executed without mentioning any thing in particular, there the sheriff, at his peril, ought to make execution of the thing in demand, otherwise he will be a disseisor; for he is obliged to take notice of the thing in demand, and has no authority from the court to make execution of any thing else.

Co. Lit. 276.

Palm. 202.

Bro. tit.

Disseisin, 74.

[For upon

the death

of the dis-

seisee, that

wrongful fee is turned into a rightful estate for life by operation of law. 8 Mod. 53. *arguendo*.]

Lease for life, remainder for life, remainder in fee; the remainder-man for life disseises the tenant for life, and then tenant for life dies, the disseisin is purged; for then the remainder-man for life is seised of his own rightful estate for life, which was to take place upon the death of tenant for life, and the fee reverts in the remainder-man in fee.

Goodtitle

v. Ridsen,

Vin. Abr.

tit. Dis-

seisin (N),

pl. 6.

[Rights and the purging of wrongful acts are always favoured in law; and therefore, where a disseisin or abatement is made, and the disseisee brings his ejectment, and has a verdict and judgment for him, (but no execution,) yet an entry by the plaintiff being found as being in the declaration in ejectment, that entry will purge the disseisin, and the continuer in possession afterwards is only as a trespasser.]

Bro. tit.

Disseisin,

43. 76.

Two co-heirs, one an infant, and the other of full age; she of full age enters upon the feoffee of their father, claiming the land to her and her sister; her entry being unlawful, the land vests entirely

entirely in her of full age, and nothing in the infant; and so she of full age must be the disseisor; for an infant can never be made a wrong-doer by the act of another, or injure himself by any contract entered into during his minority.

If my tenant at will enters into another's land contiguous to his own, claiming it to my use, and feeds his cattle there, and fells the trees, upon which the tenant of the freehold is obliged to quit his possession, and so brings his assise; and it is found that I never commanded my tenant to commit this disseisin, nor ever shared in any of the profits of it, I shall be acquitted of the disseisin, since it would be apparent injustice to charge me with the guilt of an act I never concurred in.

Bro. tit.
Disseisin,
59.

A. demises the land of *B.* to *C.* for years, rendering rent, *C.* enters and pays the rent to *A.*: it seems *A.* by this transaction is a disseisor; for his demise to *C.* is tantamount to a command to enter into the lands of *B.*, and he that commands the disseisin is the disseisor.

Bro. tit.
Disseisin,
77.

A. has common in the land of *B.*, and *B.* comes with his family and incloses the land, so that *A.* cannot have the use of his common: *B.* and his family are disseisors; for they oust *A.* of his common by the inclosure, which is plainly a disseisin.

Bro. tit.
Disseisin,
79.

A man leases for life, rendering rent, with a clause of re-entry for non-payment, and for arrears of rent distrains; and being possessed of the distrains, re-enters; and adjudged a disseisor; for though he had an election upon non-payment of the rent to re-enter or distrain, yet by distraining he had determined his election, and so put it out of his power to re-enter; therefore when afterwards he re-enters, it is unlawful, and, consequently, such an ouster of him who has the freehold, as amounts to a disseisin.

Bro. tit.
Disseisin,
81.

Land descends to an infant, and *A.* enters as guardian only, and devises it to *B.* and dies, *B.* enters, and the infant brings an assise against him, and he was adjudged a disseisor; for though *A.* was the first that entered, yet he entered as guardian, so that it was in the election of the infant to charge him as a disseisor, or call him to an account as a guardian; and therefore when the infant charges the devisee as a disseisor, it shall be presumed that he looked upon *A.* as his guardian, otherwise *B.* could not be charged as the disseisor, but as the devisee of the disseisor; for if he had reckoned *A.* as his disseisor, then *B.* must have been esteemed a person who claimed under the disseisor by legal conveyance, and so not to be charged as the actual disseisor of the infant. But if the infant is supposed to look upon *A.* as his guardian, then he may charge *B.* as a person who ousted him by wrong of his freehold, since he, and not the guardian, was the person who seized the possession without title.

Bro. tit.
Disseisin,
85.

The father enfeoffs his son within age, and after enters as his guardian, and enfeoffs *J. S.* and dies; the infant brings his assise against the feoffee, who was adjudged a disseisor for the reasons before-mentioned; and likewise, because it is provided by *Westm.* 2. c. 25. that if lessee for years, or guardian, alien in fee, the remedy for recovering the freehold shall be by an assise of novel disseisin,

Bro. tit.
Disseisin, 94.
2 Inst. 429.
413.

difseifin, and both the feoffor and feoffee shall be esteemed difseifors, and the furvivor of them shall be liable to this remedy: so, if either happens to die, he that furvives may be construed as a difseifor, and as such liable to this action.

2 Inst. 413. Not only guardians in chivalry, but in socage, and by nurture, come within this law of *Wylm.* 2. So also their alienations not only in fee, but in tail, or for life, are within this act; for wherever a freehold is transferred by the solemnity of livery, by a person who has no right to make such a conveyance, there is an actual ouster of him that has the freehold, and so a difseifin.

1 Inst. 413. Here it will be proper to observe, that though the said statute mentions only tenant for years, yet tenant by elegit, statute-merchant, or staple, as also tenant at will or at sufferance, are by an equitable construction brought within it, as being all equally capable, by the possession which they enjoy, of committing difseifins, by transferring the freehold by livery: but a bailiff is not within the act, because it mentions and intends only those persons who have some interest, and thereby a possession in the lands, which a bailiff has not.

2 Inst 413. If tenant for years, or a guardian, make a lease for life, remainder for life, remainder in fee, and tenant for life enters, he is a difseifor, for he accepts of the livery, which transfers the freehold, and so produces the difseifin, and therefore makes himself a party to the wrong. The same law of him in remainder, if he in remainder for life or in fee enters, for such entry is an agreement to that act which makes the difseifin.

Bro. tit. Difseifin, 95. If a guardian accepts of a feoffment from his ward, the ward may bring an assise against him as a difseifor; for the guardian acts contrary to his duty when he assents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family.

Cro. Eliz. 169. Alex. and Dyer. A. lets lands for 21 years, from *Michaelmas* next ensuing, rendering rent, and the lessee enters 29th *September*, and occupies for one year; the lessor brings debt for the rent reserved; and adjudged, that though his entry, which was without title, made him a difseifor, and that this difseifin was not purged by the accruing of the term after, yet debt lay upon the contract; for though his entry, being made the day before the lease commenced, cannot be supposed to be made by virtue of the contract, yet it does not disannul the contract, for that must remain till defeated by an after-agreement of equal notoriety with it; and therefore the action in this case may well be formed upon it: and the reason why in this case the accruer of the term after entry did not purge the difseifin, is because when the lessee enters before his title accrued, he is presumed to disclaim the title of a termor, and set up another; and therefore such title shall not protect him from the notice of the law; for that would be to consider him under a title which by an express overt-act he disowns.

(B) What Persons are capable of committing such Disseisins.

AS to femes covert, if a husband disseise another to the use of his wife, this does not make her a disseisorefs, she having no will of her own: nor will any agreement of hers to the disseisin, during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisorefs, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee.

So, if a man disseise another to the use of a feme covert, her agreement to it signifies nothing; and though the husband's agreement to it settles the estate in the wife, yet it makes her no sharer in the guilt of the disseisin.

But if a feme covert actually enter and commit a disseisin, either solely or together with her husband, then she is a disseisorefs, because she gains thereby a wrongful possession: but yet such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors; because though by such entry she gains an estate, yet she has no power of transferring it to another.

As to infants, they are under the same restrictions with feme coverts; so that their *agreement* during minority to a disseisin committed to their use does not bind or make them disseisors, any more than if an infant *commands* a disseisin to be made; because no acts, during their minority, are so binding, but that they may at full age revoke and cancel them. But an *actual entry* by an infant into another's freehold gains the possession, and makes him a disseisor as well as it does a feme covert.

Two infants jointenants, one releases to the other, by which the other holds the whole: this seems a disseisin, because the release, being in no manner for the advantage of the infant, is utterly void, and then the entry of the other being without title is tortious and a disseisin. But if there had been livery made upon it, though between jointenants, this is void, yet it seems no disseisin, for the regard the law has for the solemnity of livery, which shall continue till defeated by act of equal notoriety.

If a man carries an infant into the lands of J. S. and there claims the lands to the use of himself and the infant; yet the infant seems no disseisor, because he made no claim of it himself, and then shall not be charged with the tort of another person.

If the king enters without title, or seises lands by a void or insufficient office, he is no disseisor; for being the fountain of justice, and engaged in multiplicity of affairs, his acts are not to be charged with injustice. But this privilege does not extend to any of his subjects; and therefore if the king by letters patent grants land so seised, and the patentee enters, he is a disseisor,

Roll. Abr.
660.
Bro. tit.
Disseisin, 67.

Roll. Abr.
660.
Bro. tit.
Disseisin, 67.

Co. Lit.
357. b.
Lit. § 678.
Roll. Abr.
660, 661.
Bro. tit.
Disseisin, 15.
67. 8 H. 6.
14. cont.

Bro. tit.
Disseisin, 5.
16. 35.
Roll. Abr.
660.

Bro. tit.
Disseisin, 19.

Roll. Abr.
661.

Bro. tit.
Disseisin, 55.

feisor, because he has time and leisure to inquire into the legality of his title, which the prince is supposed to want leisure for.

Side head of Corporations.

If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consists of a constant succession of various persons, and as a corporation can do no act without writing.

Distress.

Bacon of Government, 77. Vigellius, 257. 271. 326. Gilb. Dist. and Replev. 2. His Rents, 3.

THE remedy for recovery of rent, by way of distress, seems to have come over to us from the civil law; for anciently, in the feudal law, the not paying attendance on the lords courts, or not doing the feudal service, was a forfeiture of the estate: but these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law, that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure, for the payment and satisfaction of it.

Under this Head I shall consider :

- (A) Who, in respect of his Estate or Interest, may distrain for Rent.
- (B) What Things may be distrained.
- (C) Of the Manner of distraining as to Time and Place.
- (D) Of the Distress when seized: And herein of the Distrainer's Interest therein, and what he is to do therewith.
- (E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.
- (F) Of distraining Things Damage-feasant.
- (G) Of Distresses for Amercements.

(A) Who, in respect of his Estate or Interest, may distrain for Rent.

IF a man seised in fee makes a gift in tail, or a lease for life, years, or at will, saving the reversion to himself, with a reservation of rent, or other services; the law gives the donor or lessor, without any express provision, remedy for such rent or services by distresses.

For this
vide head
of Rent.
Lit. § 214.
Bro. tit.
Distress, 5.
15., and

this my Lord Coke calls a rent distrainable of common right. Co. Lit. 142. a. 8 H. 4. 15. Mo. 36. Cro. Eliz. 636. The bailiff that distrains must shew in whose right he does it. Bro. Distress, 78. [A receiver under the court of Chaucery has power, it seems, to distrain without applying to the court for particular directions for that purpose, unless there be a doubt who has the legal right to the rent; for the distress must be in the name of the persons entitled to the legal estate. Pitt v. Snowden, 3 Atk. 750. Hughes v. Hughes, 3 Br. Ch. Rep. 87.]

But if the donor or lessor reserve not the reversion, he cannot distrain of common right: but he may reserve to himself a power of distraining, or the reservation of the rent may be good to bind the lessee by way of contract, for the performance whereof the lessor shall have an action of debt.

Co. Lit. 47.
a. 5 Co. 3.
Jewell's
case.
2 Saund.
303.

A rent distrainable of common right, or by the common law, cannot issue out of an incorporeal inheritance: as if I have a right of common in another man's soil, and I grant it to A. reserving rent, if the rent be behind, I cannot distrain the beasts of A. because the right of common, which every man has, runs through the whole common.

Co. Lit. 47.
a. 142. a.
2 Roll. Abr.
446. So, of
tithes, be-
cause there
is no place
where the

distress can be taken. Cro. Jac. 111. 173. 2 Roll. Abr. 446. 451. Co. Lit. 47. 142. Bro. tit. Distress, 67. 80. 11 H. 4. 40. 5 Co. 5. vide Chan. Ca. 79.

A rent granted for equality of partition by one coparcener to another, is good: so, is a rent granted to a widow out of lands whereof she is dowable, in lieu of her dower: the like law of a rent granted in lieu of lands upon an exchange: and for these the law gives a remedy by distress, without any provision of the parties, though they have no reversion.

Co. Lit.
169. b.
3 Co. 22. b.
Keilw. 104.
126.

If a termor grants all his term, rendering rent, he cannot distress for it.

Bro. Dis-
tress, 7.
Latch. 211.

Bro. Debt, pl. 39. Freem. 228. pl. 226. Cro. Jac. 487. Stra. 405. Al. 57. [2 Will. 375. — v. Cooper. Where a lease came back to the original lessor by an agreement entered into between him and the assignee of the lessee, that the lessor should have the premises on the terms mentioned in the lease, and further should pay a certain sum annually over and above the rent towards the good will already paid by the assignee, it was adjudged, that such agreement operated as a surrender of the whole term, and that the assignee could not distrain either for the original rent, or the sum to be paid in gross annually. Smith v. Mapleback, 1 Term Rep. 441.]

[2 Will. 375.]

[Although a term be vested in an annuitant himself for securing an annuity, yet he may distrain for the arrears: as where lands were conveyed to trustees and their heirs to the use of A. for 99 years, if he should so long live, upon trust that he should receive and take thereout an annuity or yearly rent of 250 l. with power of distress, and subject thereto, to the use of the grantor for life, remainder over—it was holden that A. might distrain,

Fairfax v.
Gray, 2 Bl.
Rep. 1326.

for that the grantor during the term was merely an under-tenant to him at the above rent, to which rent distress was incident by law, exclusive of the clause in the deed.]

7 Co. 23-4. If a man seised of land in fee, and possessed of other land for years, grant a rent-charge for life out of both, with a power to distrain in both, if the rent be in arrear, the leasehold as well as the lands of inheritance are subject to the distress, because a man may oblige his chattels to the discharge of the rent: but the rent being a freehold, shall issue only out of the inheritance, because the leasehold, being only a temporary and perishing interest, is not a fund commensurate to the charge, and therefore the rent shall issue out of the inheritance, which for its duration is a more competent estate to support the charge, and render the grant effectual: and hence it was adjudged, that though the grantee might distrain in the leasehold lands, yet he must avow for a rent issuing out of the inheritance.

27 Aff. 24. For an heriot service due after the death of the tenant, the lord
Bro. Heriot, may either distrain or seize the best beast of the tenant.
6. Fitz.

Avowry, 157. Cro. Eliz. 32. 590. Cro. Car. 260. Jon. 300. Roll. Abr. 665. n. 5. So, may the lord distrain for relief. [Co. Lit. 83. if he claims the relief not by tenure, but by custom, it seems there must be a prescription to warrant the distress. Lat. 37. 95. 130. 3 Bullstr. 323. 1 Jon. 132.] If he dies, his executors cannot distrain, but may have an action of debt for it. 4 Co. 49. Ognell's case. [Co. Lit. 83. b. 47. b. 1 Show. 36.] Where a distress might have been taken for aid to marry his daughter, or make his son a knight. Roll. Abr. 665. 2 Inst. 234.

Co. Lit. The services or rent, for which the lord or lessor may distrain,
56. a. must be certain, or such as may be reduced to a certainty; for otherwise the lord cannot, in his avowry, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has sustained. But if the tenant holds of his lord to sheer all his sheep feeding in such a manor; this is certain enough, because it is easy to compute the number within the precincts of the manor; and consequently, what expence the lord is at in employing other hands to that work, and what damages he sustained by the omission of his tenant.

4 Co. 50. b. If a man seised in fee, or for life, of a rent-charge, after ar-
Ognell's rearages incur, grants over the rent to another, he cannot distrain
case, Vaugh. for these arrearsages, because they are by the grant divided from
20, 41. the freehold of the rent.
S. C. cited;
the same law of a rent service. Roll. Abr. 672.

Moss v. [If the mortgagee give notice of the mortgage to a tenant in
Gallimore, possession under a lease prior to the mortgage, he may distrain for
Doug. 266, all arrears of rent in his hands at the time of the notice, as well
1 Term Rep. as for what accrues subsequent to it.]
364. See
Powell's Mortgage, 84.

For this *vide* If tenant *pur auter vie*, or tenant for years, held over, yet the
14 H. 4. 31. lessor could not distrain them for (a) rent that became due before
23 H. 7. 96. the determination of their respective leases, though they contin-
6 Co. 64. ued in possession of the land afterwards; for when the lease was
Co. Lit. 47. determined, the lessor could not avow on them as his tenants,
Cro. Jac. claiming under a lease, which was determined.
442. (a) But
might not
train the cattle damage-tenant. Kellw. 96. a.

To remedy this, it is provided by the 8 Ann. c. 14. "That
 " whereas tenants *pur auter vie*, and lessees for years, or at will,
 " frequently hold over the tenements to them demised, after the
 " determination of such leases; and whereas after the determi-
 " nation of such, or any other leases, no distress can by law be
 " made for any arrears of rent that grew due on such respective
 " leases, before the determination thereof; it is enacted, That it
 " shall and may be lawful for any person or persons, having any
 " rent in arrear, or due upon any lease for life or lives, or for
 " years, or at will, ended or determined, to distrain for such ar-
 " rears after the determination of the said respective leases, in
 " the same manner as they might have done, if such lease or
 " leases had not been ended or determined; provided that such
 " distress be made within the space of six calendar months, after
 " the determination of such lease and during the continuance of
 " such landlord's title or interest, and during the possession of the
 " tenant from whom such arrears became due."

Vide also
 4 Geo. 2.
 c. 28.
 11 Geo. 2.
 c. 19.

[Where there is a custom that a tenant may leave his away-
 going crop in the barns, &c. of the farm for a certain time af-
 ter the lease is expired, and he has quitted the premises; the land-
 lord may distrain the crop so left after the expiration of the six
 months, and within the time limited by the custom.]

Beavan v.
 Delahay,
 1 H. Bl. 5.

If a lessee dies before the expiration of the term, and his per-
 sonal representative continues in possession during the remainder
 and after the expiration of it, the landlord may distrain under
 this act for rent due for the whole term.]

Braithwaite
 v. Cooksey,
 1 H. Bl.
 465.

(B) What Things may be distrained.

THERE must be a valuable property in some body in the things
 distrained; therefore, no distress can be of dogs (a), deer (b),
 coney, &c., which are *feræ naturæ*.
 The legislature hath passed an act to prevent the stealing of them. See st. 10 Geo. 3, c. 18. (b) But deer kept in
 a private enclosure for the purpose of sale or profit may be distrained for rent. Davis v. Powell, C. B.
 Hila. 11 G. 2. 3 Bl. Com. 8.]

Co. Lit. 47.
 [(a) *See* as
 to dogs, now
 that the le-

Things fixed to the freehold, or part of the freehold, as fur-
 naces, chauldrons, doors, windows, fixed to the freehold, or corn
 growing, cannot be distrained.
 2 Mod. 61. [So, an anvil in a smith's shop, and a millstone in a mill, are privileged from this distress;
 and a temporary removal of the anvil out of the stock, or of the millstone out of the mill, for the purpose
 of its being picked, does not destroy the privilege. 14 H. 8. 25. b.] * Cattle on the common, and
 corn growing, may be distrained for rent, by 11 Geo. 2. c. 19. § 8.

18 E. 3. 4.
 Co. Lit. 47.
 2 Inst. 82.
 S. P.

No man can be distrained for rent by the utensils of his trade (c),
 as the axe of a carpenter, the books of a scholar, the mate-
 rials for making cloth in a weaver's shop; for these the law pro-
 tects under a presumption, that without them the tenant could
 neither be useful to others, nor gain a livelihood for himself.

Co. Lit. 47.
 (c) But
 where by
 prescription
 a toll is due
 for repairing
 a key or

harbour, which is to be levied by distress, such distress may be of those implements, by which the party
 gets his livelihood, for the maintaining of those is for the public good; and therefore the taking part of
 the loading has been adjudged good. Mod. 104. Lev. 56, 97. S. C. Raym. 232. Ld. Raym. 385.

2 Stra. 1228. So, has the distraining part of the tackle of the ship, as where the anchor, cable, and sails were taken. Carth. 357. *Ld. Raym.* 384. 12 Mod. 216. 5 Mod. 359. Salk. 248. pl. 4. for this *vide plus*, 2 H. 7. 16. 2 Roll. Abr. 202. 3 Co. 710. Dyer 352. The cart of a husbandman may be distrained, though an implement of his occupation. Carth. 359. admitted *per cur.* [And implements of trade may be distrained if not in actual use at the time, and no other sufficient distress can be found. Gorton v. Falkner, 4 Term Rep. 565. Simpson v. Harcourt, C. P. Mich. 18 Geo. 2. cited by Buller, J. *Id.* 569. The like law with respect to *averia carucae*. But *averia carucae*, or implements of trade, may be distrained for a poor's rate, although there be other sufficient distress: for the distress in this case is in nature of an execution. Hutchins v. Chambers and others, 1 Burr. 579. Com. Dig. tit. Distress (C). Saund. on Conventicles, p. 39.]

10 H. 7. 21. Also, for the benefit of trade and commerce, some things are privileged from being distrained, as an horse in a smith's shop, an horse in an inn, sacks of corn or meal in a mill, cloth or garments in a taylor's shop, or sacks of corn or meal in a market.

668. Cro. Eliz. 549. 596. [Noy, 68. But a chariot standing at a livery-stable is not privileged from distress. Francis v. Wyatt, 3 Burr. 1498. 1 Bl. Rep. 483. Nor is a race-horse in a stable belonging to an inn keeper, a mile distant from the inn. Croser v. Tomlinson, Hertford Assizes, *coram Ryder*, C. J. cited in 3 Burr. 1500.]

Cro. Eliz. 550. *per curiam arguendo*. So, if an horse carries corn to a mill, and is tied to the mill door, during the grinding of the corn, he shall not be distrained (a). But cattle driving to a market, and by the way put into a pasture, may be distrained.

(a) 2 Vent. 50. But *vide* 2 Vern. 130. [*Infra*, note on the last case.]

Roll. Abr. 668. And these things are privileged, though they continue there three or four days, or are retained never so long by the tenant for his satisfaction in some thing he has done about them.

Roll. Abr. 608. *equus, gulfribus, or a horse*. If a man rides to a place, and is there taken sick, by means whereof he is obliged to tarry there two or three days, his horse cannot be distrained for rent.

which a man keeps for journeys cannot, as is said, be distrained. 2 Inst. 133. 2 Roll. Abr. 160. Roll. Abr. 668. *Sed quid?* Nor an horse upon which another rides. Co. Lit. 47. Cro. Eliz. 552. But an horse upon which a man is riding, may be distrained damage-feasant, and led to the pound with the rider on him. Vent. 36. Sid. 440. [But this is not law. Things in actual use cannot be distrained, because the taking of them would occasion a breach of the peace. See what is said by Willes, C. J. on the case of Webb v. Bell, 1 Sid. 440. in 4 Term Rep. 569. and Storey v. Robinson, 6 Term Rep. 138.]

Co. Lit. 47. Things distrained damage-feasant cannot be distrained for rent, because they are in the custody of the law.

In debt against an executor he pleads *riens in ses mains*, but certain goods distrained and impounded: adjudged no assents to charge him. Cro. Eliz. 27. [So, it seems that goods under an attachment cannot be distrained. Monk's case, 1 Vent. 221. *arguendo*.]

Cro. Eliz. 549. 596. adjudged. 3 Lev. 261. G. C. cited. A private person, who undertakes to carry all persons goods, thereby becomes a common carrier, and the goods in his possession are privileged. Salk. 249, 250.

Roll. Abr. 667. Keilw. 145. 2 Inst. Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained, for this reason; and

and also for the damages, that shocks of corn, * hay, &c., might sustain, it was held that they could not be distrained. 82. [But money in a bag sealed may be distrained; for the bag sealed may be known again. 22 E. 4. 50. b.] * But for this *vide* 2 W. & M. c. 5 set forth at large, letter (D), *post*. [But notwithstanding this act, sheaves of corn, it seems, cannot be distrained for the arrears of an annuity. Horton v. Arnold, Fort. 361.]

Averia caruce, or beasts of the plough, or any thing belonging to it cannot by common law be distrained while there are other goods or beasts (which *Bracton* calls *animalia otiosa*), which may be distrained. Also, a covenable distress is not of armour or vessel, or apparel, or jewels, so long as there are other sufficient or covenable, nor of sheep, saddle-horse, poultry, or fish. Co. Lit. 47. 2 Inst. 133. See *supra* in this chapter.

By the statute *de districtione scaccarii* made 51 H. 3. §. 4. "No man shall be distrained by the beasts that gain his land, nor by his sheep, but until another distress or chattels sufficient be found, except for damage-feasant." This statute extends not only to distresses between Lord and tenant, and

but to all other distresses, as well as the suit of the king, as at the suit of the subject. 2 Inst. 133. Dal. 84. In an action on this statute, it is not necessary to shew that there was a sufficient distress, *præter*, &c. But it must come on the other part, *§.* to plead that there was not a sufficient distress, *præter*, &c. Dyer, 312. p. 85. It must be intended there was cattle sufficient at the time of the distress, and it is not material what was before or after. 2 Inst. 133.

It is agreed that the cattle of a stranger escaping into his neighbour's grounds, and there being *levant* and *couchant*, may be distrained by the lord or lessor of those grounds for rent or services due to him; for it shall be imputed the owner's folly that he did not provide against this mischief by proper bounds and fences. 27 E. 3. 80. 2 Inst. 296. Palm. 43. Dyer 317, 318. 2 Leon. 7, 8. Co. Lit. 47.

2 Brownl. 170. But such cattle shall not be liable to a distress for an amercement. Noy, 20. Nor to a rent-charge issuing out of those lands, unless they were *levant* and *couchant*. Roll. Abr. 668. 1 Mod. 63. And by the better opinion of the books, it seems not to be material whether they were *levant* or *couchant* or not. *Vide* Co. Lit. 47. 2 Sand. 290. 2 Brownl. 170. Palm. 43. Hob. 265.

Cattle which are in certain land by way of agistment may be distrained for rent. Roll. Abr. 669.

If the tenant ought to inclose against the highway by prescription, and in driving my cattle by the way, by default of the inclosure they escape into the land of the tenant, the lord cannot distrain them: so, if he ought to inclose by prescription against my land, and my cattle escape. 22 E. 4. 49. 15 H. 7. 17. b. Roll. Abr. 668. But for this *vide* 2 Leon. 7. Dyer 317. 2 Sand. 289, 290. Pool and Longueville.

If *A.* and *B.*, have two closes lying contiguous, and *A.* by prescription is bound to repair the fences between both the said closes, and *A.* leases his close to *C.* for years, rendering rent; and the fences between the two closes being out of repair, the cattle of *B.* escape into the close of *A.*, he may distrain them for rent arrear; and it is not material whether they are *levant* and *couchant* or not: adjudged, and the judgment affirmed upon a writ of error, though objected that they escaped there through the default of *A.* who ought to have taken care that the hedges were repaired: and by *Sanders*; *nota*; this was a hard case to maintain, there being a vast difference between the lord's taking a distress within his feignory, and the lessor's distraining for rent reserved upon his own lease; for the lord had nothing to do with the land or fences, and so it concerns not him whether they are in repair or not; otherwise of the lessor; for he ought to repair them, else he will have advantage of his own wrong.

[The

Kimp v.
Crewes,
2 Lutw.
1573.

[The various cases upon this point were very fully considered in a later case, where the following distinctions were made. If a stranger's beasts escape into the land, by the default of the owner, they may be distrained for rent, without being levant or couchant. But if their escape be in consequence of the default of the tenant of the land in not repairing his fences, the lessor cannot distrain them, though they have been levant and couchant, unless he have given notice to the owner, and he suffer them to remain there afterwards. But the lord of the fee, or the grantee of a rent-charge, may in this last case distrain them, without giving notice, after they have been levant and couchant.]

2 Vent. 50.
Fowkes and
Joice.
3 Lev. 260,
261. S. C.
But *vide*
2 Vern 129.
Where in
this very
case the
party had

If a man, that is driving his cattle to *London* to sell, asks leave of the lessor to put his cattle into the ground for a night, and he gives him leave so to do, with the consent of the lessee, and the cattle are put in accordingly; the lessor is not concluded by this licence, but that he may distrain them for rent; adjudged upon demurrer; and it not appearing by the pleading that the ground belonged to a common inn, it came not in question whether in that case they might have been distrained.

relief in equity, the consent of the head landlord being looked upon as a fraud and contrivance to subject the cattle to a distress, and there cited the case of Bredon and Pierce, where there being two years arrear of a rent-charge, and cattle came by escape out of the next ground, and were distrained, &c. The Lord Nottingham relieved against it. Priced, in Chan. 7. S. C. decreed for the plaintiff with costs, at law, and in equity.

(C) Of the Manner of distraining, as to Time and Place.

Co. Lit. 142.
7 Co. 7. a.
9 Co. 66. a.

A Distress for a rent-service, or a rent-charge, cannot be in the night, but one may distrain cattle damage-feasant in the night, otherwise they may be gone before morning.

4 Leon. 218.
But if before
the stat. 8
Ann. c. 14.
and 11 Geo.
2. c. 19.

If the tenant, when the lord is in view of the cattle, to avoid the distress, chafes them into a place not within the lord's distress, yet the lord may take them freshly; for the tenant shall not have advantage of his own wrong.

the tenant, before the lord had view of them, had chafed them away, or if the tenant for other lawful reason, even after view, had chafed them away, or if after view the cattle went out of themselves, the lord could not distrain them. 44 E. 3. 20. Co. Lit. 161. a. 268. a. 2 Inst. 131. [But now by 11 Geo. 2. c. 19., goods, &c. may be distrained in 30 days, after removal.]

Buckley v.
Taylor, 2
Term. Rep.
600.

6 Mod. 214.

[If by the custom of the country, or by express stipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may distrain for it on that day. So, it seems, by the usage of a parish, a quarter's rent may be distrained for before the end of the quarter.]

(a) This is
declarative
of the com-
mon law.

2 Inst. 104.

(b) This is
intended of

By the statute of *Marlbrige* made (a) 52 H. 3. c. 2. "None shall distrain any to come to his court, (b) which is out of his fee, or upon whom he has no jurisdiction, by reason of a hundred or bailiwick, nor take distresses out of the fee or place where he hath (c) jurisdiction."

suit-service in respect of a feignory, and not of suit-real in respect of residence. 2 Inst. 104. (c) But no distress is prohibited by this act in any place where he hath power, by custom or otherwise, to

distrain: 1 A. d. 71, 72.

By the same statute, c. 15. it is enacted, "That from (a) (a) But this
"thenceforth (b) it shall be lawful for no man (c) for any man- is only in
"ner of cause to take distresses out of his fee, or in the king's affirmance of the com-
"highway, or in the common street, but only to the king and mon law.
"his officers, having special authority so to do." 2 Inst. 131.

must not be taken *simpliciter*, so as to take advantage thereof in bar of an avowry, but *secundum quid*, viz. that the tenant may have an action against the lord upon this statute, in which he shall be fined. 2 Inst. 132. And if it may be pleaded in bar of the avowry, the king shall lose his fine. (c) This must be intended only of distresses by reason of a feignory, and not of distresses for rent-charges, &c. or by reason of a leet. 2 Inst. 131. And. 2. Nor of such things for which no distress can be taken but in the highway, as for toll-thorough due by custom. Cro. Eliz. 710. But an heriot custom may be seized in the highway, for that is not a distress but a seizure: but a distress cannot be taken there for an heriot-service. 2 Inst. 132. Goulst. 97.

If the lord coming to distrain hath a view of the beasts within 2 Inst. 232.
his fee, and before he can distrain them the tenant chases them
into the highway, the lord, notwithstanding the statute of *Marl-*
bridge, c. 15. may distrain them there.

A distress for rent may be taken in a house, if the door be 46 E. 3. 26.
open; so may it be taken out of a window. b. Roll. Abr. 671.

5 Co. 92. One cannot break open the outer door to distrain; and Ld. Hardwicke C. J. held, that a padlock put on a barn door could not be opened by force, to distrain the corn. 9 Vin. Abr. 128. pl. 6. If the outer door be open, one may break open the inner door to distrain. Comb. 17. [See the stat. 11 G. 2. c. 19. § 7., which empowers the landlord in the case of goods being fraudulently removed to prevent a distress, to break open a dwelling-house, taking a constable with him, and having first made oath before a justice of a reasonable cause to suspect that they are therein. See *infra*, tit. Rent, (K).]

[If the demises are several, there must be separate distresses upon the several premises subject to each distinct rent; for one distress cannot be taken distributively, and the law gives no right to enter into any premises but those whence the rent issues.] Rogers v. Berkmore, Ca. temp. Hardw. 245. 2 Str. 1049.

(D) Of the Distress when seized: And herein of the Distrainer's Interest therein, and what he is to do therewith.

BY the common law, a man might have driven a distress whither he pleased, which was very mischievous; 1st, Because the tenant was bound to give the beasts sustenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. 2dly, He could not tell where to have a replevy; but now,

By the statute of *Marlbridge*, made 52 H. 3. c. 4. "None shall cause a distress to be driven out of the county where taken, on pain of fine," &c. This statute is confirmed by *Wishmister* the 1st, made 3 E. 1. 2 Inst. 191. Yet if the tenancy is in one county, and the manor in another, the lord may drive the distress taken in the tenancy unto the manor in the other county; for the tenant doing suit to the manor, or common intendment knows what is done there. 2 Inst. 106. Keilw. 50. Bro. Distress, 33. Where he who will take advantage of this act must do it by way of action, so as to entitle the king to a fine, vide 3 Lev. 48.

Also by the statute of the 1 & 2 of Ph. & Mary, c. 12. "No distress shall be driven out of the (d) hundred, rape, wapentake, (d) Not into the county of the city
"or

Litchfield,
though till
1 Mar. part
of the hun-
dred in
which, &c.
Goulf. 100.
(a) Godb. 11.
Goulf. 101.

“ or lathe, where taken, except to a pound overt within the same shire, not above (a) three miles distant from the place where taken; and no distress shall be impounded in several places, (b) whereby the owner shall be constrained to sue several replevins, upon pain that (c) every person offending shall forfeit to the party grieved 5*l.* and treble damages.”

(b) As if impounded in several liberties, &c. else it is no offence within the statute. Noy, 52. Dyer, 177. in margin. (c) But where three persons distress a flock of sheep, and severally impound them in three several pounds, whereby, &c. yet they shall forfeit but one five pounds and one treble damage. Cro. Eliz. 480. Moor, 453. pl. 020. Noy, 52. 62. Dyer, 177. in margin. But Noy, 62. by Fennor, if the plaintiff brings his action against them severally, every one shall pay 5*l.* But 2. [Trespass will not lie for impounding a distress in another county, but the action must be upon this statute. *Ginbart v. Pelah*, 2 Str. 1272.]

Co. Lit. 47.
A pound
overt is a
pinfold made
for such
purposes, or
the close of
him that distrains,
or the close of a stranger with his consent,
where the distress is taken: a pound covert
or close is when the distress is impounded in a house. Co. Lit. 47.

If a man distrains dead goods, as utensils of a house, or such like, which may take damage by wet or weather, and the like, he ought to impound them in an house or other pound covert within three miles in the same county; for if he impounds them in a pound overt he ought to answer for them.

Co. Lit. 47.
2 Inst. 106.
S. P.

If a man distrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpose; but if put in a pound covert or close, where the distrainer ought to keep them at his peril, and yet he shall not have any satisfaction for it.

Owen, 124.
Dyer, 280.
pl. 14. But
cattle taken
in *Wit-
nam* may be
used.

He who distrains cannot make use of the distress, so as to work a horse, &c. for he hath no property therein, but a bare power by act of law to take it: so, if a man hath a return irrepleviable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem remansur*. &c.

Owen, 46.

1. Leon. 220.

Roll. Abr.
648. 879.
Owen, 124.
Cro. Jac.
147. Yelv.
96. Where
a man dis-

If a man takes a cow for a distress, he cannot milk her; for though the cow be the better for this, yet he ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, he who took the distress may distrain again.

trained a trunk for rent, and being informed that there were things of value in it, he caused it to be corded to prevent damage; he was for this adjudged a trespasser *ab initio*; cited by Twissden to have been adjudged before Roll, C. J., 1 Ventr. 37. [It is said by Popham, C. J. that the distrainer may meddle with a distress where it is for the owner's benefit, as by scouring armour, or fulling raw-cloth. Cro. Eliz. 78;] A hide distrained cannot be tanned, for the property is thereby *quasi* altered; the marks whereby the owner might not know it, being thereby taken away. Cro. Eliz. 783. If a man distrains for several barrels of beer, and draws beer out of one of them, he is a trespasser *ab initio* as to that barrel only. 6 Mod. 216. per Holt, C. J. [It is provided by the 11 G. 2. c. 19. § 19, 20. that for any unlawful act done, the distrainer shall not be a trespasser *ab initio*; but that the party grieved shall only have an action for the real damage sustained; and not even that, if tender of amends is made before any action is brought.]

27 Aff. 64.
Roll. A. br.
673. Where
one distrained
a horse
damaged
fence, &c.

If a man distrains a horse, and impounds him, and the horse leaps three times over the pound, which is as high as it used to be, and thereupon he who distrained ties the horse to a post in the pound, by reason whereof he strangles himself, the owner may have an action of trespass.

where the horse afterwards escaped, but it did not appear that it was by the distrainer's fault; in an action of trespass

pafs brought by him for the trespafs done by the hog, it was adjudged that the action would not lie, for he might choose what pound he pleased, and it was his folly not to choose one that would hold him; which is not like a distress dying in pound, that being the act of God; and his default must not entitle him to another action, nor subject the defendant to a double punishment for the same cause, viz. the loss of his pig, and the damages and costs in this action. Saik. 248. pl. 3. Ld. Raym. 719.

Distresses for rent being in nature of pledges, and the person distraining having no power to sell or dispose of them, they oftentimes proved of little or no benefit towards hastening the payment of the rent; for remedy whereof it has been enacted,

“ That where any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five (a) days next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law; that then after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may with the sheriff, or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken, (who are hereby required to be aiding and assisting therein,) cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom the sheriff, under-sheriff, or constable, are hereby empowered to swear) to appraise the same truly, according to the best of their understanding; and after such appraisement shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner's use.

“ And that upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby, shall, in a special action upon the case, for the wrong thereby sustained, recover (b) treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession.

Lawson v. Story. Carth. 321. Ld. Raym. 199.]

“ Provided, that in case any such distress and sale be made by virtue or colour of this act, for rent pretended to be arrear, and due, where in truth no rent is arrear, or due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken, that then the owner of such goods or chattels distrained, and sold as aforesaid, his executors or administrators shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his, or their executors or

2 W. & M. sess. 1. c. 5.

[(a) The five days are inclusive of the day of sale. 1 H. Bl. 14.]

§ 4.
[(b) The plaintiff under this clause is entitled to treble costs as well as damages.

§ 5.

“ administrators

“ administrators, recover double the value of the goods or chattels so distrained and sold, together with full costs of suit.

§ 3.

Also, the same act empowers “ any person, having rent arrear, to seise and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land charged with such rent, and to lock up or detain the same in the place where the same shall be found, in the nature of a distress, till the same shall be replevied, upon such security to be given as aforesaid; and in default of replevying the same within the time aforesaid, to sell the same after such appraisement thereof to be made; so as such corn, grain, or hay, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seised; but be kept there *as impounded*, till the same shall be replevied or sold, as aforesaid.”

4 Mod. 231,
232. Salter
and Brund-
sen.

An action was brought, wherein the plaintiff declared against *A. and B. in custod. mar., &c. de eo quod ipsi*, such a day and year, *apud, &c. in com. prædicti vi & armis, &c. bona & catalla, viz. quadraginta quarteria hordei ipsius C. (pl.) ad valentiam 40 librarum* *ad tunc & ibidem invent. nomine districtionis pro redditu per ipsum C. præfat. A. super dimission. messuag. & quarundem terrar. eidem C. per ipsum A. ante tunc. facti. debiti. & in arrethro fore supposit. & præsentis. colore cujusdam actus parliamenti in hujusmodi casu nuper edit. & provis. ceper. & distrixer. & bona & catalla illa sic district. ad tunc & ibidem detinuer. quousq; postea ss. 23 die, &c. præd. bona & catalla colore actus illius vendider. & disposuer. ubi revera & in facto tempore captionis bonorum & catallor. præd. aut tempore venditionis eorundem nullus redditus per ipsum C. eidem A. debiti. aut in arrethro fuit, & alia enormia, &c. B.* One defendant pleads not guilty, and issue thereupon, and judgment is given against the other defendant by default, &c. and it was now moved in arrest, &c. that there must be a lessor and lessee to bring this case within the act, and that if there be no demise, this act gives no remedy; and here no demise is sufficiently set forth in the declaration; nor is it said that the goods were distrained for rent arrear, but that they were taken *nomine districtionis*, which is not a good averment that they were distrained; but *per cur.*, the declaration is good.

4 Mod. 385.
to 395.
Walter and
Rumball.
Comb 336.
S. C. Id.
Raym. 53.
55. Spik.
247. pl. 1.
12 Mod. 76.
* Who was
the owner of
the goods
distrained,
though not
the tenant
of the land.

In trover, on not guilty pleaded, it was found, that *A.* was seised in fee of certain lands lying in two hundreds, and demised them to the plaintiff's father for two years at *40 l. per annum* rent, and that for *50 l.* arrear of rent, the defendant, by order of the bailiff or steward of *A.* who was beyond sea, distrained the goods in the declaration, being *levant and couchant* upon the lands, and gave notice thereof to the plaintiff, * who did not replevy them; and that after five days after such notice, the defendant, with the constable of one hundred, in the presence of the constable of the other hundred, caused the said goods to be appraised by two persons, sworn for that purpose, by the constable of one hundred, in the presence of the constable of the other hundred; and that he after sold some part, but not to the value

value of the rent arrear, and carried away the other goods in order to sell, when he should have an opportunity, &c. The first exception taken to the verdict was, That it was not found, that the goods were sold with the concurrence of the sheriff or constable, who ought to be present as well at the sale as at the appraisement; because if any overplus, it is to be left in their hands. 2dly, That it was not found the goods were sold for the best price that could be gotten; and if sold at an under-rate, the party shall not be concluded. 3dly, That it was not found that the defendant had any direction to sell the goods, but only to take them, and it may be the landlord would have kept them still as a distress. But principally it was insisted, that notice to the plaintiff himself, who was owner of the goods, was not sufficient, but it ought to have been left at the most notorious place, by the express words of the act; and so the authority given by this act not pursued; and then the defendant is a trespasser *ab initio*, as he who works a distress: and the notice ought to have been given to the tenant of the land, because he might have paid the rent and saved the goods; or if not, he might have replevied them, which he might have done, though he were not the owner thereof. Also the goods are not duly appraised, for they were appraised by two persons, sworn by the constable of one hundred only; and though it were in the presence of the constable, yet that was not sufficient, because this distress was in the name of an execution; and being taken in several hundreds, the constables of both hundreds ought to have caused the appraisement to be made; this act being an authority to them both for that purpose, where the distress happens to be in two hundreds, the constable of one hundred having no power over the goods taken in another hundred, out of his own. But *per cur.* This statute was made for the benefit of the landlord, not of the tenant; and therefore notice to the owner of the goods was sufficient; for the only reason of directing the notice to be left at the mansion-house was, that the owner might have notice by the tenant to replevy them, and no need of notice to both, because either of them might replevy them; and as the owner of the goods is principally concerned, notice to him is much the best. And though the distress be taken in two hundreds, yet it is but one distress taken at one time, and for one entire rent; and both constables being present, there is a sufficient concurrence of both, though one only administer the oath, for two oaths were not to be administered, and the chief design of directing the presence of the constable, was for the sake of the landlord, to prevent any breach of the peace; and the presence of the other constable made it his act, though he were out of his own hundred; for the statute to this purpose gives him power to act in any place. It was therefore adjudged for the defendant.

If a landlord comes into a house, and seizes upon some goods as a distress, in the name of all the goods in the house, that is a sufficient seizure of all; and though by the common law the landlord was to remove them in a convenient time; yet since the statute 2 *H. & M. c. 5.* they are to be removed immediately, except

6 Mod. 214.
per Holt,
C. J. 1d.
Raym. 54.
2 Id. Raym.
1423.
Barnard,

K. 11. 3. 4. except corn or hay, though the things in their own nature
 2 Stra. 717. are not easily, or without damage removeable, as barrels of
 (a) By
 11 Geo. 2. beer, &c. (a)
 c. 19. § 10., they may be secured and sold on the premises chargeable with the rent.

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

This statute made
 52 H. 3.

BY the statute of *Marlbridge*, distresses must be reasonable, and not too great.

c. 4.; *vide also* 51 H. 3. stat. 4. the statute *de districtione seccarii*. If the landlord takes an unreasonable distress, a: 1 action lies upon this statute, but not an indictment or information, because a private offence. Mod. 7 t. 288. Lev. 299. Raym. 205. Vent. 104. [Nor will trespass lie for an excessive distress, except in one case, where the things distrained are of certain known value, as gold or silver; in all other cases the action must be on the statute. *Hutchins v. Chambers*, 1 Burr. 590. *Moir v. Munday*, Hil. 28 G. 2. B. R. cited in the last case. *Lynne v. Moody*, Fitzgib. 85. 2 Str. 851.] No distress for homage or fealty shall be said to be excessive, for the high esteem these are of in the law; but 2. & *vide* 42 E. 3. 26. 4 Co. 8. b. *Bevill's case*, 2 Inst. 107., where, notwithstanding it is said, that the statute of *Marlbridge* is general, *vide* 13 H. 4. Fitz. tit. *Avowry*, 239., it was held, that a distress of more than the value shall not be said excessive, for the expences of knights of parliament; because the thing is in a manner party.

41 E. 3. 26.
 3 Roll.
 Abr. 674.

If forty sheep are taken for 2*d.* and sixteen oxen for 9*d.* this is excessive.

29 E. 3. 24.
 Roll. Abr.
 674.

So, if two oxen are distrained for four pair of gloves, ten sheep for one pair, and ten for another, it is an excessive distress.

5 H. 4. 15.
 2 Vent. 183.
 S. P.

But if a man takes five horses joined in a cart for 3*d.* rent, this is not excessive for the entirety.

2 Inst. 107.

So, if the lord distrain an ox or an horse for a penny, if there were no other distress upon the land holden, the distress is not excessive; but if there were sheep or swine, &c. then the taking of the ox or horse is excessive, because he might have taken a beast of less value.

Moor, 7.
 pl. 26.
 Cro. Eliz.
 13. S. C.
 Bro. Dist.
 tress, 98.
vide 17 Car.
 2. c. 7. § 4.,
 by which it
 is enacted,

If for 10*l.* rent due at one day, a man distrains goods of the value of 40*s.* only, and at the time of taking the distress there are goods of a sufficient value upon the premises, he cannot, for the same rent, distrain again; for it was his folly, that at the first he distrained no more; but if there be rent in arrear at several days, a distress may be taken for what was due at the other days.

That where the value of the cattle distrained shall not be found to be to the full of the arrears distrained for, the party, to whom the arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears. [Whether or not there shall be more distresses than one depends upon the entirety and identity of the thing distrained for, not upon the value of the goods taken. One entire duty, or sum, shall not be split, and distrained for, part at one time, and part of it at another time; for instance, if, as was the case in *Lutwyche*, the whole sum due be 77*l.* 10*s.*, a man shall not distrain for 62*l.* 10*s.* at one time, and afterwards distrain again for 15*l.* the residue of the 77*l.* 10*s.*, but he shall distrain for the whole 77*l.* 10*s.* at once. But if, from mistake or ignorance of their value, the goods at first distrained for the whole 77*l.* 10*s.* be not sufficient to satisfy it, he may distrain again in order to supply the deficiency, and to make up that same sum. *Wallis v. Savill*, 2 *Lutw.* 1532. *Hutchins v. Chambers*, 1 Burr. 589.]

[A distress

[A distress may be taken for rent under a lease, though the tenant entered before the commencement of it.]

If a distress be taken of goods without cause, the owner may rescue them.

cannot. 39 E. 3. 35. b. 1 Roll. Abr. 673. If a man distrains my cattle, together with the cattle of J. S. without cause, J. S. or I may justify the rescue of all. 39 E. 3. 35. b. per Thorpe.

But if a distress be taken without cause, and put into a pound, the owner cannot break the pound and take them out, because they are in the custody of the law.

N. Bendl. 30. pl. 48. S. P. vide stat. 2 W. & M. sess. 1. c. 5. and Co. Lit. 47., where the writ de parco fracto will lie. F. N. B. 100. Winch, 20, 81.

If the lord, or another that has a rent, distrains several times for his service or rent, where none is in arrear, the tenant may by the common law have an *affize de sovent distress*.

homage or fealty so often, that the tenant cannot manure his land, yet the tenant shall not have an *affize de, &c.* 4 Co. 8. b.

This action lay at common law, in which the writ is general and count special, that the lord distrained, &c. and judgment, not that the demandant *recuperet seisinam*, for he hath that, but *quod teneat absque multiplici districtione*.

(F) Of distraining Things Damage-feasant.

SHOCKS of corn may, by the common law, be taken damage-feasant.

Lat. 8. S. P. admitted *per cur.* Fitz. Avowry, 363. S. C. Bro. Distress, 30. S. C.

A greyhound may be taken damage-feasant running after conies in a warren: so may a ferret brought into a warren.

2 E. 3. Fitz. Avowry, 182. Roll. Abr. 664.

But if a man brings nets and gins through my warren, I cannot take them out of his hands.

7 E. 3. Roll. Abr. 664. Cro. Eliz. 352. S. P.

If men are rowing upon my water, and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets, and detain them as damage-feasant, to stop their further fishing.

Cro. Car. 228. ; but adjudged he could not cut their nets.

If a man rides upon my corn, I cannot take his horse damage-feasant.

664. ; but per Sid. 440., it is said by the Chief Justice, that the horse upon which one is riding may be distrained damage-feasant ; and it seems he shall be led to the pound with the rider upon him. See Vent. 36. Vide *supra*, letter (B), *conr.*

7 E. 3. Avowry. Roll. Abr.

If a man takes my cattle, and puts them into the land of another man, the tenant of the land may take these cattle damage-feasant, though I who was the owner was not privy to the cattle's being damage-feasant ; and he may keep them against me till satisfaction of the damages.

Roll. Abr. 665. Robinson and Waller, per totum curiam, Roll.

Rep. 449. S. C. and S. P. per two justices.

Co. Lit. 161. If a man coming to distrain damage-feasant, sees the beasts on his soil, and the owner, on purpose, chafes them out before they are taken, he cannot distrain them.
 6 Co. 21. a. S. P. that the owner of the soil is not obliged to take the cattle damage-feasant, but may chase them out with a little dog.
 2 Roll. Abr. 360. pl. 15.

30 E. 3. 27. A commoner may justify the taking of the cattle of a stranger upon the land damage-feasant.
 wine head of Common,

vol. 1. 624.

46 E. 3. So, if a man hath common for ten cattle, and he puts in more, the surplussage above the ten may be taken damage-feasant.

12. b. Bio. Avowry, 29. S. C. [Scit, where the number is uncertain. Hall v. Harding, 4 Burr. 2426.]

Co. Lit. 142. A man may distrain cattle damage-feasant in the night, for otherwise, perhaps, the cattle will be gone before he can take them.
 7 Co. 7. a. S. P. 9 Co. 66 a. S. P.

2 Jon. 193. If turfs lie upon a common damage-feasant; though for this a commoner may distrain them yet he cannot burn them.
 [The commoner's power of distraining is not mentioned in the case cited.]

Wigley v. Peachy and others, 2 Ld. Raym. 1589. [Goods brought to a market to be sold, cannot be distrained by the owner of it for toll as damage-feasant. Sawyer v. Wilkinson, Cro. El. 628.]

Mayor of Launceston's case, Cro. El. 75. If a man hath a freehold in a market, and corn is brought thither on the market-day, and set down, he cannot justify the taking it there damage-feasant.

Burt v. Moore, 5 Term Rep. 329. *A.* demised to *B.* the milk of twenty-two cows, to be provided by *A.*, and to be fed at *A.*'s expence, on certain closes belonging to *A.*; and *A.* covenanted that *B.* might turn out a mare, and that no other cattle should be fed there. *B.* may distrain other cattle of *A.* there, for the separate herbage and feeding of the closes passed to *B.*

(G) Of Distresses for Amercements.

Roll. Abr. 665, 6. **O**F common right, a distress is incident to every fine and amercement in a sheriff's torn or court-leet, whether the same belong to the king or to a subject; if the offence, for which they were imposed, be of common right incident to the jurisdiction of such courts.
 Roll. Rep. 201. 11 Co. 45. a. Cro. Jac. 382. 10 H. 7. 15. pl. 12. 10 H. 6. 7. 100. 11 H. 7. 24. a. 21 H. 7. 40. b. Salk. 175. Doct. and Stud. 138.

Vent. 105. But if such offences were only the neglect of a duty created by custom, it is questionable whether it doth not require the like custom for a distress, though the duty be of a publick nature: as, Raym. 204. 2 Keb. 701. 739. 745. By the report of the case in Vent. the court inclined, that where a custom only en- for this fine, without a special custom to distrain, was doubted; and

and the case adjourned, no special custom to distrain being alleged. abled to set a fine, it cannot be

distrained for without a custom: also in Raym. it is said by Twifden, that when a duty is raised by custom, a distress for that duty must be maintained by the like custom. is raised by

But if it be for the private benefit of a subject, no distress is incident to it without a special custom. Roll. Rep. 76. 11 Co. 44. b. 2 Hawk. P. C. 63.

The sheriff or lord of a leet may, for such fines or amercements, distrain the goods of the offender in (a) any lands within the county or precinct of the leet, of whomsoever they shall be holden, except (b) only in such lands which shall be in the king's hands; these being wholly out of the jurisdiction of such courts. (a) 2 H. 4. 24. b. 47 E. 3. 13. a. Bro. Leet, 28. 41. Fitz. Avowry, 194.

Roll. Abr. 670. 2 Inst. 104. (b) 47 E. 3. 12, 13. Fitz. Distress, 15. Roll. Abr. 670.

And such a distress may be taken in the highway; for the statute of *Marlbridge*, c. 15. which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands. 2 Inst. 131. 47 E. 3. 13. And. 72.

Such fines and amercements being for a personal offence, no stranger's beast can lawfully be distrained for them, though they have been *levant* and *couchant* on the lands of the offender. 47 E. 3. 13. a. 41 E. 3. 26. b. Era. Dist.

tres, 3. F. N. B. 100. Owen, 116. Noy, 20. contra. Roll. Abr. 669. pl. 20. [Roll. cites for the contrary opinion the case in 41 E. 3. 26. b. which seems an authority (if any) the other way.]

It seems to be agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold, after they have been kept a reasonable time, as the space of sixteen days: and it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a publick nature, they may be sold of common right, without any special custom for that purpose. Hesley, 62. Finch, 470. 3 H. 7. 4. b. 1 Roll. Rep. 76. Noy, 17. 1 Bull. 53.

No bailiff can lawfully distrain for any such fine or amercement, without a special warrant for so doing; which must be set forth by him in an avowry or justification of such a distress. 3 Mod. 138. Cro. Eliz. 698. 742. Moor, 544.

2 Keb. 745. Salk. 107. pl. 2. [In replevin the officer must shew that "the defendant was guilty;" in trespass the conviction is a sufficient justification. It must appear too, that the amercement was by the jury, and not by the court. Stephens v. Houghton, 2 Str. 847.]

[By prescription there may be a distress for toll in a fair or market. But toll is not incident of common right to a fair; and, therefore, if the fair is a new one, and toll is not expressly granted, a custom cannot support it. Hob. 187. Roll. Abr. 66. Holloway v. Smith, 2 Str. 1172.

If goods are fraudulently sold out of a market, in order to evade the toll, the owner of the market cannot distrain them for it.] Blakey v. Dintale, Cowp. 661.

Dower.

I'ide 2 Bl.
Comm. 129.
Dower by

DOWER is the part of the husband's estate that comes to the wife upon the death of the husband.

the civil law, was the portion the wife brought to her husband, either in land or money, whereof the *naturale dominium* belonged to the wife, and the *dominium civile* to the husband; so that the husband had only the *usus fructus* during his life in things immoveable, but could not alien them; in things moveable he might alien them, but must restore to the value; for these, upon the dissolution of the marriage, by the death of the husband, or divorce, came back to the wife. *Vide* Vin. 249. Corvin. lib. 23. tit. 3. Honorius, 114, 115. Donations *inter sponsum & sponsam propter nuptias* began about the time of *Constantine*, and were made before marriage; but by the *Justinian* constitution they were good after marriage, and were gifts from the husband to the wife, which, upon the dissolution of the marriage, came back to the husband as the dower did to the wife. Vin. 245. Init. of Imperial law, 43. 117, 118, 119. Among the feudists, the rule was, *non uxor marito sed uxori maritus affert*; and the reason was that the husband and eldest son of the family being brought up in military exercise, the wife and youngest sons tilled and improved the land, and in their expeditions found provisions for the army; and having the third part in labour, she had the third part of the feud for the maintenance of her and her younger children during her life. *Spelm.* tit. *Dotarium*, 175.

Co. Lit.
33. b.
39. b.

Dower is of five sorts: 1. At common law. 2. By custom. 3. *Ad ostium ecclesiæ*. 4. *Ex assensu patris*. 5. *De la plus beal*. We shall begin with the first and chief.

Co. Lit.
30. b.
Perk. 301.

Dower, at common law, is the third part of all the lands whereof the husband has been seised during the coverture, of such an estate as the children by such wife might, by possibility, have inherited, and to which by the death of the husband, the wife is entitled for her life. For the better understanding thereof, I shall consider it under the following heads:

(A) Who may have Dower, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.

(B) Of what Estate a Woman may have Dower.

1. Of the Quarentine.
2. Of the different Kinds of Inheritances.
3. Of the Nature and Quality of such Estate, whether sole, joint, or in common.
4. Of its Continuance; wherein, of Estates conditional, suspended, determined, or extinguished; and herein of Remitter to the Heir, and Recoveries by Title Paramount.
5. Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.

(C) Of

(C) Of the Things requisite to the Consummation of Dower, *viz.* Marriage, Seisin, and the Death of the Husband.

1. Of the Marriage, how long it must continue; and herein of the several Sorts of Divorces.
2. Of the Seisin, either in Fact or in Law; and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous.
3. Of the Death of the Husband.

(D) Of the Assignment of Dower.

1. By what Persons.
2. Of the Manner; and herein of assigning of it by Metes and Bounds, &c.
3. By what Court.

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

(F) What shall be a Bar of Dower, and what not: And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after: And herein of Elopement, and Detinue of Charters, or Heir.

(G) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.

(H) To whom the Tenant in Dower shall be attendant, and by what Services.

(I) Of the Proceedings and Damages in Dower *unde nihil habet*.

(K) Of the Admeasurement of Dower.

(A) Who may have Dower, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.

Lit. § 36.
Co. Lit.
35. a.
Doct. &
Stud. lib. 1.
c. 7.
F. N. B.
149.
1 Roll. Abr. 675.

AS to the age of the husband it is not material, but only the age of the wife; and if she be of the age of nine years or more at the death of her husband, she shall have dower, though her husband be then but four years old. The reason the law would not allow women before this age to demand dower seems from their incapacity of having issue sooner.

2 Inst. 234. Leon. 53. Brook, tit. Dowe, § 5. 45.

13 Co. 22.
Co. Lit.
33. a.

The support of the children is part of the consideration whereon this allowance of dower is founded; and, as on the one hand it would be unreasonable to extend it to such women as are incapable of performing the conditions; so on the other hand it would not be reasonable to exclude women of sufficient age, by reason of the incapacity of their husbands; since that is the act of God, which ought in no sort to prejudice the wife: much less can the husband by his own act prevent his wife of dower, if she attains the age of nine years during the coverture; and therefore, though he aliens his land before, yet if she after arrives at nine years of age, her title is now consummate *ab initio*, and over-reaches his alienation: for dower being intended a provision for the wife and children, whenever she attains such an age, as the law adjudges her capable of children, nothing farther is required: and therefore though the husband die before he or his wife are of age of consent, yet if she be nine years old, this is a sufficient marriage to entitle her to dower, and so ought to be certified by the bishop.

Dyer, 313.
Pl. 42. 369.
pl. 48.
Co. Lit.
33. a.
Co. Lit. 40.
Roll. Abr.
675. S. P.

If a man marries a woman of 100 years old, and dies, she shall be endowed; for the law cannot determine the precise time of the failure of her capacity to have issue, which may vary according to the strength and other circumstances of the woman.

7 Co. 7.
Co. Lit.
31. a.
But by the
law of the
crown, if
the king marry an alien she shall be endowed, because princes cannot marry according to their dignity, unless to persons abroad.

If a woman alien, be she friend or enemy, marry a subject, she shall not be endowed, because by the policy of the law all aliens are disabled from acquiring any freehold amongst us; but for this *vide* head of *Aliens*.

Co. Lit. 31.
For R. 1.
erected a
court where
all the real
and personal

If a Jew born in *England* marry a Jew born also here, and the husband be converted to the Christian faith, and after purchase lands, and enfeoff the other, and die, the wife shall not have dower.

estate of the Jews was registered, and upon the death of any Jew came to the king, though it was redeemable by their children paying a fine; and in this court she could not demand dower but against a Jew, and she could not demand it at common law against a Christian; and for this reason it shews if the husband had not aliened, yet she could not recover against the heir of a Christian. Hollingshead, vol. 3. p. 15.

Women Papists seem not disabled to demand and recover dower within the words of 11 & 12 W. 3. c. 4.

If a woman be attainted of treason or felony *, she shall not have her dower, but if pardoned she shall be received to demand it, though the husband has aliened in the mean time, because by the marriage and seisin of her husband she was entitled to dower, and when the impediment is removed, her capacity is again restored.

felony, this seems no impediment of her dower, for this forfeits no freehold, nor title to any freehold, though the king shall have the profits during the conviction. * See *infra*.

At common law if the husband was attainted of treason, murder, or felony, the wife lost her dower, because it was a condition annexed to all feuds, that the feuditary should not commit such crimes.

But afterwards the statute 1 E. 6. c. 12. ordained, that in all cases where the husband was attainted of treason or felony, their wives should notwithstanding have their dower: but 5 E. 6. c. 11. repeals that in all cases of treason; the words of which act being general, exclude the wife as well in case of petit treason as in case of high treason. But in case of misprision of treason, or attainder of felony only, the other act stands in force, and therefore, they shall have dower in all such cases.

If the husband seised of lands in fee makes a feoffment, and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee.

Co. Lit. 111. a. S. P. And though the husband had been pardoned, yet should not the wife recover dower. Leon. 3. Mayne's case. But of land purchased by the husband after the pardon, the wife shall be endowed. Perk. 391.

The (a) wife of a *felo de se* shall have dower.

(a) Plow. 261. a.

262. a. Dame Hafe's case.

So, (b) if the husband be outlawed in trespass, or any civil action; for this works no corruption of blood, or forfeiture of lands.

(b) Brook, 82. Perk. 388. Co. Lit. 31. a.

So, (c) if the husband be attainted of heresy, yet his wife shall be endowed; for this works no corruption of blood, or forfeiture of lands, being only a spiritual offence.

(c) Co. Lit. 31.

If the husband or wife be excommunicated, yet the wife's dower is not hurt, because being a spiritual punishment only, it does not affect their temporal possessions.

If the husband be attainted in the *præsumptio*, my Lord Coke says that she shall be endowed. Co. Lit. 31. a.

After the making of the statute 1 E. 6. c. 12. it seems to have been doubted whether the wife should not lose her dower in case of any new felony made by act of parliament; and therefore, where several offences have been made felony since, care has been (d) taken to provide for the wife's dower.

(d) As in 5 Eliz. c. 14, which makes a second forgery, felony without

clergy. So 3 Eliz. c. 3. which makes it felony to transport sheep, &c. So also in 31 Eliz. c. 4. which makes it felony to embezzle the king's armour to the value of 20 s. So in 3 Jac. 1. c. 4. which makes it felony to serve foreign princes without first taking the oath of obedience. So also in 1 Jac. 1. c. 31. which makes any one's going abroad with the plague upon him, felony. And this took

dower being only part of the judgment by implication may well be saved by an express proviso, without any repugnancy. 3 Inst. 47. 78. 80, 81. 90.

Perk. 313. If a villein marry and then the lord enter, and then the villein
Co. Lit. 30. die, his wife shall be endowed, for the lord's title began but by
But other- his entry, and the wife's title to dower began before.
wife, if he had been villein to the king. If a freeman marries a nief, she shall be endowed, but her lord may enter on the lands during her life. Co. Lit. 31. a.

Perk. 363. If a woman being a lunatick kill her husband, or any other, yet she shall be endowed, because this cannot be felony in her who was deprived of her understanding by the act of God. So, though she be of sound mind, and refuse to bring an appeal of his death, when he is killed by another, yet she shall be endowed;

Perk. 364. for this is only a waiver of that privilege the law has given her to be avenged of her husband's murderer: so, it seems, if she refuse to visit and assist her husband in his sickness, yet she shall be endowed, for this is only undutifulness, which the law does not punish with the loss of her entire subsistence.

Co. Lit. If an idiot or lunatick marry and die, his wife shall be endowed, for this works no forfeiture at all, and the king has only the custody of the inheritance in one case, and a power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the lunatick, and therefore the wife dowable.

31. a. And therefore if lands descend to an idiot or lunatick after marriage, and the king on office found takes those lands into his custody, or grants them over to another as committee in the usual manner; yet this seems no reason why the husband should not be tenant by the curtesy, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the king's title is at an end; but for this *quare*, & vide Plowd. 263. b. 4 Co. 124, 125. [The marriage of idiots must be void upon general principles of law, by reason of their incapacity to contract.]

(B) Of what Estate a Woman may have Dower.

1. Of Quarentine.

Co. Lit. 32. b. 34. b. 2 Inst. 16, 17. Brook, 107. Hob. 155. and F. N. B. 161. (E.) the writ *de quarentina habenda*. By the old law before the Conquest, the widow was to continue in her husband's house a whole year

THIS is a privilege the law allows to women to continue in the capital messuage or mansion-house, or some other house whereof they are dowable, 40 days after their husband's death, whereof the day of his death is counted one; and during this time they are to be provided with all necessaries at the expence of the heir, and before the end thereof to have their dower assigned to them. This privilege is confirmed by *Magna Charta*, c. 7. and seems to be only a compliance with that decency and ceremony, custom has introduced upon so melancholy an occasion, that widows, who are supposed to be under great affliction, may not be forced to appear abroad, and be put to their shifts for a maintenance; and for this reason, if they marry within the 40 days, their quarentine ceases, for then they have provided for themselves, and their sorrowful condition is supposed to be at an end.

after his death, within which time her dower was to be assigned; and if she married before the year was out, she forfeited her dower, and whatever her husband had left her.

In a writ of dower the demand was of three manors, the tenant pleads in abatement entry in part *puis darrein continuance*, and shews it in certain; the demandant replies that her husband in his lifetime was seised in fee of one of the said manors, *&c. super quo quidem manerio ipse et eadem pet. cohabitabant ut vir et uxor usque diem obitus sui*, and that he died, and this descended to the defendant as heir, and he entered, and that he and the demandant continually after the husband's death *hucusque commorabant et cohabitaverunt super dicto manerio*, and that she claimed at the will of the heir, *et non aliter*; and this was held no plea for the quarantine, because she did not shew the time of her husband's death in certain, and the 40 days after.

Dyer, 76.
pl. 32.
Kett. eby's
case.

2. Of the different Kinds of Inheritances.

Of a Use a Woman shall not be endowed.

[This must mean a use not executed.]

[So, of a trust-estate of inheritance, or of an equity of redemption a mortgage in fee, a woman shall not be endowed.]

Chaplin v.
Chaplin,
3 P. Wms.

229. Attorney General v. Scott, Ca. temp. Talb. 138. Goodwin v. Winsmore, 2 Atk. 325. Burges v. Wheate, 1 Bl. Rep. 138. 161. Dixon v. Saville, 1 Br. Ch. Rep. 326.

Of an annuity to a man and his heirs, after a writ of annuity brought, a woman shall not be endowed: but if a rent-charge be granted to a man and his heirs, and before any distress made the husband die, and the wife bring her writ of dower, the heir cannot, by claiming it to be an annuity, defeat her of her dower thereof: but if he brings an annuity, and recovers judgment before the wife, then it is become an annuity *in perpetuum*, and the wife shall be barred.

Perk. 341.
Co. Lit.
32. a.
Moor, 83.
Poph. 87.
Co. Lit.
144. b.

Of copyhold lands a woman shall not be endowed, unless there be a special custom for it; but if there be a custom to be endowed thereof, then she shall have the assistance of such laws as are made for the more speedy recovery of dower in general, being within the same mischief, and therefore shall recover damages within the statute of *Merton*.

4 Co. 22.
Hob. 216.
5 Co. 116.
Vide title
Courtesy of
England,
and the rea-
sons there

given. 4 Co. 3. Cro. Eliz. 426. Moor, pl. 559. Co. Lit. 33. a. If the wife of a copyholder brings dower in C. B. the lord of the manor may plead *ne unques seise que*, &c. and give the special matter in evidence.

Of a castle for defence of the realm, or of the homage and services appertaining to war, a woman shall not be endowed, because of no service towards her support and maintenance, and she is supposed unable to assist in the defence of the realm: so, of the capital messuage, being *caput baroniae*, or *comitatûs*, a woman shall not be endowed, because this division would lessen the grandeur of the family, and disable the heir to support the dignity of his character.

Roll. Abr.
676. Co.
Lit. 30. b.
165. a.
Perk 426.
2 Inst. 17.
Though
this seems
to be the
doctrine of
the books

cited, yet it has been lately adjudged, that a woman shall have a dower of the capital messuage, though it be *caput baroniae*: the reasons given for the judgment are, 1st, That the *caput baroniae* spoken of in the ancient books was held by military tenure, which is now extinct, and was a castle of defence. 2dly, That the husband being made a baron after the marriage, this could not deprive the wife of her dower

dower

dower in any thing she was before dowerable of; and therefore though she had accepted 400*l.* per annum in lieu of her dower, as was pleaded; yet it not appearing to be in lieu also of her dower in the capital messuage called Bromley Hall, she had judgment, and this judgment affirmed in a writ of error: also, the books before cited agree, that of a private estate for habitation only a woman may be endowed; so, of the capital messuage of her husband, it it be not *caput baroniz*. *Lady Gerrard v. Lord Gerrard.* 3 Lev. 401. Salk. 54, pl. 1. 253. pl. 3. S. C. 5 Mod. 64. S. C. Comb. 352. S. C. *Ld. Raym.* 72. *Skin.* 592. pl. 6.

Of *tithes* women were not dowerable till 32 *H. 8. c. 7.* for before that statute tithes were not a lay fee, but now they are dowerable of them.

Style's Practical Register, 122. 21 Co. 25. Co. Lit. 32. a. 159. a. Roll. Abr. 682. And the best way to assign dower of tithes is the third sheaf, or the third part of the tithes generally, because it is uncertain what part of the land will be sown; and therefore if the garbs of any third part of the land in certain should be assigned, the tenant may perhaps not sow that part at all, and so defeat the dower. [But the assignment is good, though tithes of the third yard-land be assigned. *M. 9. Jac. C. B. Kettdoby's case.* Haie's MSS. Co. Litt. 32. a. n. 3. 15th edit.] How dower of tithes of wool and lambs is to be assigned, *vide Brownl.* 126. 2 Brownl. 143.

Of *common of pasture in gross*, which is certain, a woman shall be endowed, but not of common without number, because it cannot be divided without furcharging the common by two, which before was only in the power of one by the grant; and when one has power by the grant to put in as many cattle as he pleases, he alone is made judge of the number, which to divide, or delegate to another, would be unjust.

Dower of several lands, meadow and pasture, and common of pasture *cum pertinentiis* in *D.* and upon *ne unques seïsse que* dower pleaded, and verdict for the demandant, it was moved in arrest, &c. that of common in gross without number a woman could not be endowed, which the court agreed; but here it being after verdict should be intended common appendant, since otherwise the judge could not have directed the jury to find for the demandant; for though it be not said *eisdem spectans*, and though if appendant it was included in *cum pertinentiis*, yet it is not *bis petitum*, but only an enumeration of the several things demanded.

In dower the demand was *de tertiâ parte libere solde*, and held not good for want of setting out in certain, for what cattle, as to their number and kind, and so like common without number.

A woman entitled to dower of a manor, in which were copyholders, demanded her dower by the name of certain messuages, certain acres of land, and certain rents, and not by the name of the third part of the manor, and recovered and kept courts, and granted copyholds, which the whole court held to be void, because she had no manor, having made her demand, as of a thing in gross: but if the demand had been of the third part of the manor, then she would have had a manor, and might have kept courts and granted copies.

Of an *advowson*, be it appendant or in gross, a woman shall be endowed, for this may be divided as to the fruit and profit of it, *viz.* to have the third presentation.

Co. Lit. 32. Cro. Jac. 621. Cro. Eliz. 360. Roll. Abr. 683. Co. Lit. 379. 3 Leon. 155. Cro. Jac. 621. Roll. Abr. 683.

Of a *villein in grofs* or *regardant* a woman shall be endowed; as to have the third day, or week, or month's work of such villein, and the writ shall be *de libero tenemento*.
 Perk. 342.
 F. N. B.
 148. c.
 Roll. Abr.
 675. Co. Lit. 32. a. 164. b. 307. a. Brook, 91. 2 Brownl. 143.

Of a *mill* a woman shall be endowed, though it cannot be divided, and therefore she shall have the third toll-dish, or *integrum molendinum per quemlibet tertium mensem*.
 Co. Lit.
 32. a.
 11 Co. 25.
 Perk. 342.
 415. 2 Brownl. 143. Bendl. 120. 4 Leon. 202. F. N. B. 149. Brook, 39.

Dower was brought *de tertiâ parte* of a mill, a kiln-house, &c. and judgment to recover the third part *in sepealitate per metas et bundas*; and this judgment was reversed upon error brought, for it ought to have been of the third part generally, and if *per metas & bundas*, none of them can make any use of it.
 Lev. 131.
 Gilpin v.
 Cookson.
 2 Keb. 8.
 S. C.

Of a *bailiwick* a woman shall be endowed, as to have the third part of the profits: so, of a fair or market, the third part of the stallage: so, of an office, as the office of the Marshalsea, to have the third part of the profits, and in such cases she shall be contributory to the third part of the charge: so, she may be endowed *de tertiâ parte exituum provenient. de custodiâ gaole Abbatiæ Westmon.* or of the third part of the profits of courts, fines, heriots, &c.
 Perk. 342.
 Style's Prac-
 tical Regis-
 ter, 122.
 Co. Lit. 32.
 Roll. Abr.
 676.
 F. N. B.
 149.
 Plow. 379.

A woman may be endowed of the third part of the profits of a park-keeper, or of the third part of the profits of a dove-house, or of the third part of the profits of a piscary, as the third fish, or *tertium jactum retis*.
 Co. Lit.
 32. a.
 Plow. 379.
 b.

[So, a woman is entitled to dower out of shares in the navigation of the river *Avon* under the statute of 10th of *Anne*.]
 Buckeridge
 v. Ingram,
 2 Vez. jun. 652.

3. Of the Nature and Quality of such Estate, whether sole, joint, or in Common.

The husband must be seised of an estate in fee-simple, fee-tail general, or as heir of the special tail; which necessarily excludes descendible freeholds: therefore, if a man make a lease for life, rendering rent to him and his heirs, and after marry, and die, his wife shall not be endowed of this rent, because it is but a descendible freehold; nor of the land, because not seised during the coverture.
 Roll. Abr.
 676.

But if tenant in tail bargains and sells his land to the husband, and his heirs, the wife of the bargainee shall be endowed against his heir, but not against the issue in tail: so, if tenant in tail grant all his estate to one and his heirs, though it be of things which lie merely in grant, as rent, common, advowsons, &c. yet the wife of the grantee shall be endowed till the grant be avoided by the issue in tail: the reason of which difference between those descendible freeholds, and these estates made by tenant in tail, seems to be, that, in the first case, the estate in its creation seems to be no greater than a freehold; but in the other nothing appears
 Saund. 261.
 Plow. 556.
 Bult. 165.
 3 Co. 84.
 10 Co. 96.
 93.

to the contrary, but that it may be an absolute fee, and till the issue comes in to shew it otherwise, and claim his right, it shall, to all intents, be regarded as such; and, by consequence, the wife of such grantee or bargainee is well dowerable thereof till the contrary appears.

How. 557.

If tenant in tail be attainted of treason, and the king grant the land to one and his heirs, the wife of the grantee shall be endowed; for the king had a qualified fee, so long as the tenant in tail had issue; and this qualified fee passed to the grantee.

Cro. Eliz.

279.

Blythman's
case. 2 Co.

72. S. C.

Moor, pl.

105. S. C.

Yelv. 51.

Freshwater

v. Bois.

Moor, pl.

940. S. C.

but if lessee

for life

leases to the

lessor and his

heirs, or the heir of his body, for the life of the lessee, and after the lessor dies, living the

lessee, the wife of the lessor shall be endowed, because this amounts to a surrender. Roll. Abr. 677.

Roll. Abr.

677.

Brook, 25.

Perk, 338.

But if tenant in tail covenant to stand seised to the use of himself for life, and after to the use of his eldest son in tail, and after marry, and die, yet his wife shall be endowed; because when he limits an estate for his own life, he hath executed all the power he had over the estate by such manner of conveyance, and the remainder is merely void; and he continues tenant in tail, as he was before: so, if he had covenanted that the land should descend, remain, or come to his son after his death; yet his wife should be endowed; for this is only a covenant to permit his son to have what he ought not to hinder him of, and makes no alteration of the father's estate.

Roll. Abr.

677.

Brook, 25.

Perk, 338.

If there be tenant in special tail, remainder to him in general tail or fee, and his wife die without issue, and he marry again, and die, his wife shall be endowed; for by the death of his first wife without issue, he was become tenant in tail after possibility, &c. which being but an estate for life was merged by the accession of the remainder in tail or fee; and so his second wife dowerable.

Between

Flavil and

Ventrice;

but q. for

the court

was divided

upon it.

Roll. Abr.

676.

If *A.* seised in fee covenant to stand seised to the use of himself and his heirs, till *C.* his middle son take wife, and after to the use of *C.* and his heirs; and after *A.* die, and this descend to *B.* his heir, who dies, and then *C.* take wife; it seems the wife of *B.* shall lose dower, because the estate of the husband ended by express limitation made before her title of dower began; and therefore her dower, which is derived out of it, cannot continue longer than the original estate.

Vide Brook

19. 36. Cro.

Jac. 615.

Lit. § 53.

8 Co. 36.

Co. Lit. 19.

2. 2 Inst.

Perk. 302.

Of an estate to a man and his wife, and the heirs of their two bodies; if such wife die, and he marry a second wife, and die, such second wife shall not be endowed, because the issue by her cannot inherit *per formam doni*.

336. Co. Lit. 31. Leon. 66. 3 Leon. 80. Noy, 66. Brook, 9. Dyer, 41. 2.

Roll. Abr.

677.

Perk. 335.

Brook 6.

Vide Cro.

Eliz. 564.

A. tenant

The husband must have the freehold and inheritance in him *simul & semel*, otherwise the wife shall not be endowed; therefore, if lands are given to the husband for life, remainder to *B.* in tail, remainder to the husband in fee or in tail, and he dies living *B.* or any of his issue, his wife shall not be endowed.

for life, remainder to trustees for ninety-nine years, remainder to *A.* in tail; *A.* dies; his wife shall be endowed, notwithstanding the intermediate estate for years. Salk. 254. pl. 4. Bates's case. Ld. Raym. 326. See the next case but one.

If a lease is made for life, rendering rent; the lessor marries and dies; his wife shall not be endowed either of the rent or of the land: not of the land, because her husband was not seised of the freehold thereof during the coverture, and the rent was but a freehold for life. But if a lease is made for years, rendering rent, and the lessor marries, and dies, his wife shall have dower of the third part of the reversion, and of the third part of the rent, as incident to it; because he had the freehold and inheritance in the land *simul & semel*; but she shall not be endowed of the rent *per se*, merely because her husband was not seised of any freehold or inheritance in it: but if no rent be reserved on the lease for years, then *cesset executio* during the term; and therefore, if a lease be made for years, remainder to J. S. and his heirs, the wife of J. S. shall be endowed; but *cesset executio* during the time.

dower discharged of them, as she shall from other charges of her husband.

Perk, 348.
Brook, 44.
60. 89.
Co. Lit. 32.
a. Perk,
335, 6.
Roll. Abr.
678.
Brook, 6.
But if a
lease for
life or years,
be made by
the husband
after the
marriage,
then his
wife shall
have her
Co. Lit. 32. 2.

In dower upon *ne unques seise que dower* pleaded, the case was thus: A. tenant for life, remainder to B. and his heirs for the life of A., remainder to the heirs male of the body of A., remainder over; A. marries, and dies without issue; and if the remainder to B. and his heirs, during the life of A., was such an interposing estate between the estate for life to A. and the remainder to him in tail, that his wife should not be endowed, was the question? And for the demandant it was said, that all the estate was really in A., and the remainder to B. for the life of A. was but a possibility; that if A. should commit a forfeiture, then B. might take advantage of it to preserve the remainder; and though, by reason of this possibility, the estate for the life of A. is not merged, yet the tail is executed to such purpose that his wife shall be endowed: but the court, on the first argument, gave judgment against the demandant; the (a) reason seems to be, because the husband was not seised of the freehold and inheritance *simul & semel*.

[The true reason is, that the remainder to B. was an intervening *vested* estate, and not Freme's C. R. 509-10. 4th ed.]

Duncombe
v. Dun-
combe,
3 Lev. 437.
(a) The
books give
no other
reason for
this distinc-
tion, but
that it would
be giving
the wife a
larger estate
than the
husband
had, where-
as she is in
only in the
per, and
continuance
of her hus-
band's estate.
a possibility.

[Lands were conveyed to the use of A. and his wife for life, remainder to the use of B. the son of A. and his wife for life, remainder to the first and other sons of B. in tail, remainder to A. in fee; A. and his wife died in the lifetime of B., who afterwards died without issue, leaving a wife: the question was, whether the wife of B. was entitled to dower in the lands? And it was decreed she was; for that the estate for life in B. was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.]

If the husband is seised of a joint estate, and dies, his wife shall not be endowed; as if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but it shall go to the survivor, who is then in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself; and so is paramount to

Hooker v.
Hooker,
Ca. temp.
Hardw. 13.

Co. Lit.
37. b.
Br. Dower,
pl. 4. 84.
Cro. Car.
101. which
last book
says it was

the ancient course in mortgages, her title of dower, which is not complete till her husband's death.
to make the estate to two, in order to prevent the mortgagee's wife of dower.

Perk. 334. So, if lands are given to two men, and the heirs of the body of one of them, and he who hath the tail marries, and dies, leaving issue; yet his wife shall not be endowed, but the survivorship shall take place: yet shall the wife be endowed upon the death of the survivor, because the husband, during the coverture, was not seised of an estate whereof she was dowable.

Cro. Eliz. 503. Father and son jointenant, to them and the heirs of the son, were both hanged in one cart for felony; the wife of the son brought dower, and upon *ne unque seisie que dower* pleaded, this matter was given in evidence; and further, that the son survived *, as appeared by shaking his leg; and adjudged she would be seisable.
Broughton v. Randal. Noy, 64. S. C. But the case as reported, is upon another point.— * I think this is a case in the civil law, where father and son were lost at sea in the same ship, and adjudged the son survived, as being according to the course of nature, and it was reasonable to suppose (being of full age) he was able longer to resist the force of the waters, than a father, who, being much older, might be presumed to be weaker.

Co. Lit. 34. b. 37. a. Of a tenancy in common a woman shall be endowed, for there no survivorship takes place, but each moiety descends to the respective heirs of the respective tenant in common; and in such case a dower shall be assigned in common too, for she cannot have it otherwise than her husband himself had.
Lit. § 44, 45.

4. Of its Continuance; wherein of Estates conditional, suspended, determined, or extinguished; and therein of Remitters to the Heir, and Recoveries by Title Paramount.

See Co. Lit. 241. a. note As to its continuance; in some cases this is material, and in some not: and therefore if donee in tail of rent or land marries, and dies without issue, and the donor enters; yet the wife of the donee shall be endowed, though in this case the estate-tail has no continuance; for to have dower is such an incident to an estate-tail, that if one make a gift in tail, upon condition, that the wife of the donor shall not be endowed; this condition is repugnant and void.
4. 13th edit. Perk. 317. Brook, 18. 36. Bulst. 163. Vaugh. 40. F. N. B. 149. 8 Co. 34. Co. Lit. 31. 6 Co. 41. Co. Lit. 224. a.

Dyer, 343. But if a rent be reserved to the donor and his heirs, upon such gift in tail, the wife of the donor shall be endowed of such rent no longer than the estate-tail continues.
pl. 53. Perk. 348. Brook, 44. Co. Lit. 32. a. 241. a. Plow. 155. F. N. B. 149.

Plow. 156. If one grant a rent out of his land to J. S. and his heirs, upon condition, that if the grantee die, his heir within age, that then, during such nonage, the rent shall cease; if the grantee die, his heir being within age, yet the wife of the grantee shall be endowed; but *cessabit executio* during the nonage of the heir; for such

such condition is part of the original constitution and nature of the rent, and then the wife can have it in no other manner than her husband had it granted to him.

If the husband seised of a rent in fee, or fee-tail, release it to the tenant, the rent is extinguished by it; and yet, as to the wife, has such continuance, that she shall have dower thereof; which the husband, by his own act, cannot debar her of.

If the husband be seised of a defeasible estate during the coverture, yet his wife shall be endowed thereof till it be actually defeated; as if the husband and wife, lessees for life, surrender to him in the reversion; this is defeasible by the wife, after the husband's death; yet in the mean time, if the reverser dies, his wife shall be endowed.

the wife of the disseisor shall be endowed: so, if tenant for life surrender, or grant his estate to the husband in reversion, upon condition, the wife of the reverser shall be endowed till it be broken. Roll. Abr. 677. Brook, 74.

If a feoffment be made to the use of J. S. and his heirs, till J. D. hath done such a thing, and then to the use of J. D. and his heirs; if J. S. die, his wife shall be endowed till the thing performed.

seems not reasonable, because his estate is then determined by express limitation, to which it was at first subject; but for this end Perk. 317. Lit. § 357. 2 Co. 59. 71. Roll. Abr. 673. Brook, 62.

If land be mortgaged to the husband in fee, and the condition be broken; and after, upon agreement, the mortgagor have the land by payment of the money; yet the wife of the mortgagee shall be endowed; for by non-payment of the money at the day, the estate of the mortgagee was become absolute, and his wife entitled to dower thereof: so, if the money was paid at the day, yet if paid by a stranger, who was no ways privy to the condition, the wife of the mortgagee shall be endowed; for conditions being in law taken strictly, if they are not complied with, according to the terms thereof, it is as if they were not performed at all; and so the wife, who is a stranger, shall not be prejudiced thereby.

even the woman's dower is avoided; for the husband's estate was *ab initio* incumbered with equity, and in that court the mortgagee is considered as a trustee for the mortgagor. Hard. 465. Abr. in Equity, 311.

If tenant in tail discontinue in fee, and after take a wife, and disseise the discontinuee, and die seised, his wife shall not have dower, because the issue is remitted to the ancient entail, which being a restitution to an ancient right, must take place of the dower of the wife of a subsequent wrongful estate, in as much as the estate of which she is dowerable is defeated.

So, if a man hath title of action to recover any land, and he enters, and disseises the tenant of the land, and dies seised, upon which his heir enters; now he is remitted to the ancient right which his ancestor had; and, by consequence, the wife of the ancestor shall lose her dower of the wrongful estate her husband had, which is determined and gone by act of law.

demandant, and his wife, mother of the tenant in special tail, and that after his father discontinued the tail

6 Co. 79.
7 Co. 65.
S. P.

Roll. Abr.
677. (14,
15.) So, if
a disseisor
die seised,
and the
disseisee
abate, yet

the wife of the disseisor shall be endowed: so, if tenant for life surrender, or grant his estate to the husband in reversion, upon condition, the wife of the reverser shall be endowed till it be broken. Roll. Abr. 677. Brook, 74.

Roll. Abr.
679.
Pe k. 302.
Brook, 11.
Cro. Car.
191. though
this be the
express doc-
trine in the
common law
courts, yet
in Chancery,
when the
mortgagor
comes to
redeem,

F. N. B. 149.
Co. Lit. 331.
a. 332. b.

F. N. B. 149.
In Dower,
the tenant
shews that
land was en-
tailed to his
father, hus-
band of the
tail

tail by fine to a stranger, and took back an estate by grant and render in general tail, and had issue the tenant; and the first wife died, and his father married the demandant, and died, and so he is remitted to the first entail, to which the court clearly agreed, and gave judgment that the demandant should be barred. 44 E. 3. 26. Brook, 14. S. C. but *Q.* at this day, since the statutes of 4 H. 7. c. 24. and 32 H. 8. c. 23. if the issue shall be remitted upon such fine, for these statutes seem against it, and then the wife shall be encowed.

Perk. 309. If there are father and son, and the father exchange lands with a stranger, and die, and the son marry, and enter into the land taken in exchange; and the stranger, being impleaded for his lands, vouch the son as heir, who enters into the warranty, and loseth, and thereupon execution be had accordingly, and then the son die; his wife shall not been dowed of the lands taken in exchange; because the recovery thereof against her husband hath relation to the time of the exchange made, which was before her title of dower began.

Perk. 322. If a disseisor makes a feoffment in fee with warranty, and the feoffee marries, and the disseisor brings a writ of entry in the *per* against the feoffee, who vouches the feoffor, &c. and each recovers in value against the other, and they have execution accordingly, and the feoffee dies, his wife shall have dower of the land recovered in value, but not of the land lost, because by title paramount: but if one recovers in value against the husband by warranty of his ancestor, and the husband dies, his wife shall be encowed of the land recovered from him, because this was by force of the warranty, and not by elder title.

F.N.B. 150. If two coparceners in gavelkind make partition, and one marries, and the other is impleaded for his part, and prays in aid of the other coparcener, who joins in aid with him, and the demandant recovers, and the tenant hath *pro rata* of that which remains in the possession of the other coparcener, who after dies; his wife shall not have dower of that which was recovered *pro rata*, because the recovery hath relation to the death of the ancestor, which was paramount to her title of dower.

5. Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.

Co. Lit. 32. If the husband makes a feoffment in fee of lands, and the feoffee builds thereon, and improves the same greatly in value; yet the wife of the feoffor shall have dower only according to the value it was of in the husband's time; for if such feoffment were with warranty, the heir would be bound to render only the value as it was at the time of the feoffment.

a. Perk. 328. If a disseisor or feoffee upon condition, improve the lands of the husband by building, &c. and the husband enter on the disseisor, or for the condition broken, he shall have all the improvements, because the estate of the one was tortious, and the other uncertain; and it was their folly to make such improvements; but if the husband had died before such entry, and his wife had recovered dower; *Q.* if she should have the third part of such improvements, for her husband was never seized.

Co. Lit. 32. a. If the heir improve the land by building or sowing it, the wife shall recover her dower with the improvement upon it, because by her husband's death her title to dower was consummate, and the improvements as to her part were *quasi* upon her land; for which reason likewise, if the land be impaired in value in the time of the heir, she shall share in the loss, unless it were voluntary by the heir himself, and then she shall recompence herself in damages against him.

If the husband himself, or his feoffee, pull down houses, &c. and then the husband die; it seems, the wife hath no remedy for those houses, because, before her title was consummate, the thing itself was destroyed.

Perk. 329.
If the husband sow part of the land, and die, and

this part be assigned to the wife for dower, whether the wife or the executor of the husband shall have the crop, *Q. & vide Dyer*, 316. pl. 2. 2 Inst. 81.

(C) Of the Things requisite to the Consummation of Dower, *viz.* Marriage, Seisin, and the Death of the Husband.

I. Of the Marriage, how long it must continue; and therein of the several Sorts of divorces.

IF a man make a contract of matrimony with a woman, and die before the marriage be solemnized between them, she shall have no dower, because she never was his wife.

Perk. 306.
It was formerly held, that a wo-

man married in a chamber should not have dower, 16 H. 3. and that the marriage should be celebrated *in facie ecclesie*; but the law is now altered, and marriages in private houses, in all circumstances, are complied with, held good; and that God is not less present in such houses than in the most sanctified places. Perk. 306. F. N. B. 150. But see 26 Geo. 2. c. 33.

If a woman make a contract of matrimony with *J. S.*, and then marry with *J. D.*, who is seised of lands, and die, she shall have dower of the lands of *J. D.*

But if a man marry a second wife, living the

first, and die, such second wife shall have no dower: so, if a woman marry a second husband, living the first, and die, she shall have no dower. Perk. 304-5. Moor, 226.

Upon issue of *ne unques accouple en loyal matrimony*, the bishop ought to certify, that they were accoupled in lawful marriage, though the man be under fourteen, or the wife above nine, and under twelve years of age at his death, because it was a good marriage till avoided, which now cannot be after his death: but if either disagree to the marriage at their age of consent; then it is avoided *ab initio*, and the wife shall have no dower.

Co. Lit.
33. 2.
Dyer, 305.
313. 367.

In dower, upon *ne unques accouple en loyal matrimony*, and issue thereupon, a writ was awarded to the bishop, who certified that the demandant was accoupled *in vero matrimonio cum predicto B. sed clandestino*, & quod B. & E. (demandant) *thori & mense parti cipatione mutuo cohabitaverunt usq; ad mortem predicti B.* and judgment thereon given for the demandant, and error brought and assigned (*inter alia*) that there was neither day nor place of the marriage mentioned in the bishop's certificate: but the court held it not material nor issuable, because the certificate from the bishop is concluding. 2. That the certificate is not good, because it did not answer to the words of the issue, *ne unques accouple en loyal matrimony*; for that it was a true matrimony, and that they lived together at bed and board, is but argumentative, that they were *legitimo matrimonio copulati*: but the court disallowed this exception; for *vero matrimonio*, though *clandestino*, *copulati fuerunt*, is as good as *legitimo matrimonio*, and hath all one intendment; and though

Cro. Car.
351.
Wickham
v. Enfield.
But for this
vide Brook
54. Dyer,
313. pl. 92.
368. pl. 48.
9. 305. pl.
60. Co. Lit.
33. b.
9 Co. 19.

it be *clandestino*, yet it doth not vitiate the marriage; and when it is added, that *thori & mensæ participatione cohabitaverunt*, &c. this proves they continued as husband and wife during his life, and therefore it is not to be questioned now; and the judgment affirmed.

Stowell v.
Weeks,
Noy, 108.
adjudged.
Godb. 145.
Co. Lit.
32. a.
33. b.

If there be a divorce *causâ adulterii*, yet the wife shall be endowed; for this does not dissolve the marriage, but only separates the parties *a mensâ & thoro*, and the marriage still so continues in force, that if either of them marry any other, such marriage is void.

2 Leon. 171. Cro. Car. 463. 7 Co. 70. Roll. Abr. 680. cont.

Cro. Car.
492-3.
Forster's
case. A wife
shall be en-
dowed, not-
withstanding

So, a divorce *propter sevitiam* or *metum*, is of the same nature, and does not dissolve the bond of matrimony, but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill usage: and therefore, the wife in such case shall be endowed the rather.

a divorce *causâ profissionis*, for which vide Roll. Abr. 681. 2 Leon. 169. Moor, 226. Cro. Car. 462. 2 Inst. 687. Co. Lit. 32. but vide 32 H. 8. c. 38. by which it seems that this and other scrupulous divorces are taken away.

Roll. Abr.
681. Co.
Lit. 32. a.
33. b.
7 Co. 70.
5 Co. 98.
2 Leon. 169.

But if there be a divorce *causâ præcontractus*, *causâ consanguinitatis*, *causâ affinitatis*, or *causâ frigiditytis*, the wife shall not be endowed; for these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again: but if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced after; and therefore if the husband die before such divorce, his wife *de facto* shall have dower, for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify that they were *legitimo matrimonio copulati*.

Cro. Car.
217.
Fulliam v.
Harris.

In dower, the writ was *præcipe A. quod reddat B. rationabilem dotem suam* of the lands, &c. *dudum C. quondam viri sui*; and for not saying, *præcipe quod reddat B. quæ fuit uxor C. &c.* that so she might appear to have title of dower as his wife, it was held ill; and that *quondam viri sui* would not sufficiently help it.

2. Of the Seisin, either in Fact or in Law; and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous.

Perk. 304.
Co. Lit. 31.
358. Lit.
§ 631.
8 Co. 34. 36.
F. N. B. 149.
Stat. Prer.
41. Brook,
66, 75.
* Though a
stranger
abates.
Perk. 371.
Perk. 372.

The husband must be seised either in fact or in law, to entitle his wife to dower. But a seisin in law is sufficient for that purpose, because otherwise it would be in the husband's power to defeat his wife of a subsistence after his death, by his own negligence or malice, and she cannot enter to gain a seisin in his right, as he may do into lands descended to her; which is the reason, that of a seisin in law a man shall not be tenant by the curtesy; and therefore if the ancestor die seised, and the husband * die before he enter into the land; yet his wife shall be endowed, though he had but a possession or seisin in law.

So, if a lease be made for life, remainder to *J. S.* in fee, who marries, and the lessee die, and then a stranger enter and intrude upon

upon the possession, and *J. S.* die before any entry made by him, yet his wife shall have dower.

If the husband purchase rent, and die before the day of payment, yet his wife shall be endowed, nay, though the day of payment be come, and the rent be tendered to the husband, who will not receive it, but utterly refuses it, and dies before any receipt thereof by him, or any other for him, and before any thing paid in the name of feisin thereof. Brook. 35. 66. 71. Perk. 373.

But if there be neither feisin in fact nor feisin in law in the husband during the coverture, but only a right of entry or action, then his wife shall not have dower; and therefore, if a man be disseised, and then marry, and die before any entry made by him, his wife shall not be endowed of that land. Perk. 366. So, if the father die seised, and a stranger abate, and then after

the heir marry, and die before entry, his wife shall not have dower; because by this abatement the feisin in law, which he had, was devested before his marriage; and so he was neither seised in fact nor in law, during the coverture. Perk. 367.

So, if exchange be of lands between *A.* and *B.*, and *A.* enter into the lands of *B.*, and then *B.* marry, and die before any entry into the lands of *A.*, his wife shall not have dower of those lands. Perk. 369.

If one enfeoff a stranger, upon condition to be performed on the part of the feoffee, and after marry, and then the condition be broken, and the feoffor die before any entry made, his wife shall not have dower; because there was no feisin at all in the husband, during the coverture. Perk. 368.

So, if a man make a bargain and sale to one and his heirs by indenture enrolled, with a *proviso*, that if such act be done, the bargain and sale shall be void; and after the bargainor take a wife, and then the condition be broken; and before entry the bargainor die; his wife shall not have dower; for though the estate of the bargainee vested by 27 *H. 8. c. 10.* of uses; yet because the husband did not re-enter, the estate of inheritance in the bargainee was not devested, nor had the husband any feisin during the coverture. 6 Co. 34. Fitzwilliam's case; but if the words had been, that after the condition broken, the bargain and sale should be to the use

of the bargainor in fee, *Q.* because then the statute reverts the possession in him again according to the use.

In some cases, though the husband be seised in fact, yet his wife shall not have dower; as, of an instantaneous feisin (*a*); and therefore, if two jointenants are, and one of them makes a feoffment of his part, and dies, his wife shall not be endowed, because he was sole seised but for an instant when he made the livery: so, if *cestui que use* (*b*) after the statute 1 *R. 3. c. 5.* and before 27 *H. 8. c. 10.* had made a feoffment in fee, and died, his wife should not be endowed, because her husband was seised but for an instant. Co. Lit. 31. F. N. B. 150. Reil. Abr. 676. Moor, 56. [(a) The proposition, that in the case of an instantaneous feisin, the wife

shall not be endowed, though here laid down broadly, is by no means general. When, indeed, the same act which gives the husband the estate, conveys it out of him again, when he is the mere instrument of passing the estate, the transitory feisin gained by such an instrumentality does not in general seem sufficient to entitle the wife to dower. But when the land in the language of Sir Wm. Blackstone, 2 Comm. 132. *abides* in the husband for a single moment, that is, as a later writer explains it, Preiton on Estates, tit *Dower*, when he has a feisin for an instant *beneficially for his own use*, the title to dower shall arise in favour of the wife. Thus, in the case put above, where lands descend on a man who is married, and a stranger enters by abatement immediately, after the death of the ancestor—there the wife of the heir shall have

have her dower, and yet the husband has merely a seisin in law, and that for an instant only, for the abatement devolved it from him. So, in the case above of the father and son jointenants, who were hanged out of one cart, where the question depended on the priority of their death. And, where a husband *testingly* gains an instantaneous seisin, as against the person benefited by, and deriving an estate in virtue of, such testious act, the wife is entitled to her dower. Thus, in Matthew Taylor's case in C. B. 34 El. cited in Sir W. Jon. 317. where tenant at will, or for years, makes a feoffment in fee, and dies, and his wife brings dower, the feoffee cannot plead that the husband was never seised; for as the court there say, in an instant he gained a seisin, or as it is better explained *supra* tit. *Disseisin* (A), since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee the feoffor had an estate, though in regard to the disfeece he is to be considered as a wrong-doer. (b) It may be questioned whether either of these instances will support the doctrine here advanced, *viz.* that there cannot be dower in the case of an instantaneous seisin. In the first, the husband is never *solely* seised during the coverture: for when he makes the feoffment he is seised *jointly* with his companion: the tenancy is not severed *until* the husband has made the conveyance, and departed with all his right and estate; and consequently, during all the time he hath seisin of the estate, he hath it *jointly* with some other, and not *solely* by himself. In the other instance, *viz.* of the *cestui que use*, the husband hath not seisin of the land *at any period*: he had merely the *use* with the *power* in virtue of the statute of 1 R. 3. of transferring that quantity of estate in the land which he had in the *use*. [Preston on Estates, *ubi supra*.]

Roll. Abr. 676. If lessee for life makes a feoffment in fee, or a lease *pur autre vie*, and dies, his wife shall not have dower, because he gained the fee but for an instant, and parted with it again, and this was no disseisin.

[*Secus*, of such a feoffment or lease by a tenant at will, or for years, for thereby he gains a freehold. Sir W. Jon. 317. Br. tit. Disseisin, &c. pl. 67. 12 E. 4. 12.]

Cro. Jac. 615. Am- If tenant in special tail marries a second wife, who is not dow-
cotts v. Ca- able of the tail, and after makes a feoffment in fee, and dies, his
therick, wife shall not have dower, because he gained the fee but for an
Roll. Abr. instant.
676. S. C.

Co. Lit. 31. So, if donee of a fine grant and render the land by the same
Vaugh. 41. fine to the donor, and die, his wife shall not be endowed, be-
Cro. Car. cause he had seisin but for an instant.
191.

3 Leon. 11. [So, if a husband become entitled to estates by virtue of surren-
Sneyd v. ders from tenants by copy of court roll, and grant them out again
Sneyd, by copy of court roll, this instantaneous seisin of the freehold will
1 Atk 442. not entitle the wife to dower.]

3. Of the Death of the Husband.

F. N. B. As to the death of the husband, this is either a natural or a civil
150. Roll. death; but upon a civil death the wife shall not be endowed; as, if
Abr. 678. the husband enter into religion, and be professed, his wife shall
Perk. 307. not have dower till he be naturally dead; for though upon such
Co. Lit. profession his heir may enter, and a writ of *mortdancesor* lies;
33. b. yet because he could not enter into religion without the assent of
his wife, and if she had dissented, his profession would be void;
therefore if she does assent, she in a manner vows chastity as
well as her husband, and shall have no dower during his natural
life.

Enchil. In dower of the lands of A. her late husband, the tenant
pl. 31. pleads in bar that A. the husband was in full life at such a place,
Thorn v. *et hoc paratus est verificare qualitercumq; curia, &c.* the demandant
Kell, Dyer, replies that her husband *obit* at such a place, &c. *et in ecclesiâ*
125. S. C. *ibidem*

ibidem sepultus, et hoc parata est verificare qualitercunq; curia, &c. *Ideo considerat. est quod predict. M. (demandant) doceat de morte, and dictus R. (tenant) de vita viri, et super hoc dies datus est, &c.* at which day the demandant examined two witnesses who did not speak directly to his death, but only of their great intimacy with him, and his being gone beyond sea for his religion, and that they had not heard of him in seven years, and concluded that in their consciences they rather think him dead, and the tenant examining no witnesses to prove him living, the demandant had judgment.

at the day of the effoign of the tenant he produced twelve witnesses *de vita viri*, who also points; and this was held the stronger proof, and the demandant was barred; for in these cases the rule is *qui melius probet melius habet*.

Moor, pl. 55. S. C. And in Dyer a case is cited, where the death of the demandant's husband was proved by four witnesses, who agreed in all points, and

(D) Of the Assignment of Dower.

1. By what Persons.

IF a disseisor, abator, or intruder assign dower, this is good, and shall not be avoided, unless they be in of such estates by fraud and covin of the woman, to the intent she may be endowed by them, or recover dower against them, and then this shall be avoided by the entry of him who hath right, though the assignment be indifferently made by the sheriff after judgment of an equal third part.

59. The reason why such assignment shall bind is, because she had a right to be endowed thereof, and might have compelled them as tenants to assign her dower thereof, and ought not to expect till the heir will re-enter or sue for recovery of his right: but if there were covin in her, and yet notwithstanding this should bind the heir, it would encourage such violence and wrong to the heir as would put him to great trouble and expence to recover his right, without any default in him. But an assignment of a rent out of such lands by them shall not bind, because *de jure* not dowerable of such rent, *vide postea*.

If there be two or more jointenants of land, whereof a woman is dowerable, and one of them assign her dower thereout, this is good, and shall bind the others, because they were compellable to assign it in such manner: but if one of them had assigned her a rent thereout in lieu of dower, this should not bind the rest, because they could not be compelled to it by suit.

or more jointenants must be understood to be where the husband has been solely seised during the coverture, and afterwards conveys or devises the lands to two or more jointly and dies; for the wife of a jointenant is not dowerable. *Vide supra*.]

If the husband makes several feoffments of his land to several persons, and one of them endows the wife of the feoffor of his part in satisfaction of all that she ought to have of the other feoffees, and she accepts it, this is good: but yet the others cannot take benefit of it, because strangers thereto, and cannot plead it, nor have any means to bring the other into court to plead it: but if the heir assigns her dower in satisfaction of dower out of his own lands, and the lands of the feoffees, then if a writ of dower be brought against the feoffees, they may vouch the heir, who may (a) plead this for his own safety, lest they recover in value against him.

Perk. 391, 395. 393. Co. Lit. 35. a. 2 Co. 67. 3 Co. 78. 5 Co. 30. 6 Co. 58. Plow. 54. b. Brook, 15.

Perk. 397. Co. Lit. 35. 2 Co. 67. [This case of assignment of dower by one of two or more jointenants must be understood to be where the husband has been solely seised during the coverture, and afterwards conveys or devises the lands to two or more jointly and dies; for the wife of a jointenant is not dowerable. *Vide supra*.]

Perk. 399.
Brook, 23.
Roll. Abr.
681.

If the husband seized of lands in right of his wife, or jointly with his wife, of lands whereof a woman is dowable, assigns the third part of the same lands to the woman for her dower; this is good, and shall bind the wife, although she survives him, because they might be compelled to it by suit.

Perk. 403.
404.
Co. Lit. 35.
Brook, 63.
94.
Roll. Abr.
681.

None can assign dower but those who have a freehold, or against whom a writ of dower lies; therefore a (a) guardian in socage, tenant by statute merchant, statute staple, or *elegit*, or lessee for years, cannot assign dower, for none of these have an estate large enough to answer the plaintiff's demand.

6 Co. 57. Co. Lit. 38. b. 39. a. 9 Co. 16, 17. F. N. B. 148. (a) But a guardian in chivalry, though he have but a chattel, may after his entry into the land assign dower; for which *vide* Plow. 141. Roll. Abr. 682. Co. Lit. 35. 38. Brook, 20. 9 Co. 17. 2 Inst. 262.

2. Of the Manner; and herein of assigning it by Metes and Bounds.

Roll. Abr.
683.
Moor, pl.
47. 66.
Which last
book says
that assign-
ment by the

If a woman be dowable of land, meadow, pasture, wood, &c. and any one of these be assigned in lieu of dower of all the rest, it is good, though it be against common right, which gives her but the third part of each; for the heir's enjoyment of the residue sufficiently accounts for her title to what she has.

Roll. Abr.
683.
But to a
writ of *ea-
tere facias*
seisinam the
sheriff cannot

If a woman be dowable in three manors, and accept of the heir one of those manors in lieu of dower in all the rest, this is good, though against common right, which gives her but the third part of each manor.

return that he delivered the demandant one of the manors in recompence of her dower.

Perk. 407.
Co. Lit. 34.
4 Co. 1.
Co. Lit. 169.
Brook, 3.
But if the
rent be
granted by

If lands whereof a woman has no right to be endowed, or a rent out of such lands, be assigned in lieu of her dower, yet this is no bar to her to demand her dower; for she having no manner of title to those lands, cannot without livery and seisin be any more than tenant at will, which is no sufficient recompence for an estate for life, which her dower was to be (b).

indenture, then it works by way of *stepel*; so, if by deed poll, or by parol, and she agrees to it, and accepts the rent, she is concluded; *vide* Perk. 410. Dyer, 91. pl. 12. In dower, the tenant pleads in bar assignment to her of a rent out of the same land for her life, *virtute cuius* she was *in dominio suo ut de libero tenemento*, &c. But for not alleging that he was seized of the land at the time of the assignment, so that he might grant such rent, it was ruled against him. Dyer, 361. pl. 11. Beesmond v. Dean, 2 Leon. 10. S. C. [b] But see 2 H. 5. 12. The heir assigns dower of lands of which the husband was seized, but the wife not dowable, she is tenant in dower. 30 E. 1. Briefe. 884. If wife be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes judicarios*. Hal. MSS. Co. Lit. 34. b. n. 9. 13th edit.]

Moor, pl.
167.
Dyer, 91. in
margine.

In dower the tenant pleads that he hath assigned to her, in recompence of her dower, 20 bushels of wheat yearly out of the same land for her life; and held a good bar, and in the nature of a rent: but sheep, horses, &c. assigned in recompence of dower are no bar, because they neither issue out of land, nor are of the nature of land.

A woman

A woman recovers dower, and hath a writ to the sheriff, who returns that he hath delivered 84 acres to the demandant of the land mentioned in the writ; and afterwards a *scire facias* is brought, suggesting that 60 acres of the 84 assigned to her by the sheriff are a stranger's, not mentioned in the record, and therefore she ought to have a new division; the tenant says that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged, that she was barred by her acceptance and entry into the 24 acres.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the heir, tertenant, or sheriff, in certainty.

Brook, 16. Co. Lit. 34. b. 37. a. b. And the reason seems to be from the partiality every one is presumed to have for themselves and their own interest; and therefore the law will not allow her in such case to be her own carver: another reason may be for the better direction of strangers, that they may more certainly know against whom to bring their *præcipe*, which they cannot be so well apprised of, if she might enter privately, and take what part she pleased. But she need not stay for the return of the writ of *habere facias seisinam*, nor for the second judgment. Palm. 265, 266. Howard v. Cavendish. And though she once refuses to accept the part assigned to her by the sheriff, yet may she afterwards enter into it. Dyer, 278.

The assignment of dower must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation; for she comes to her dower in the *per* by her husband, and is in, in continuance of his estate, which the heir or tertenant are but ministers or officers of the law to carve out to her; and therefore such conditions or reservations are either totally void, and her estate absolutely discharged from them, or else the estate assigned with such condition or reservation is no bar to her recovery of dower, in an action brought for that purpose; as if the trees are excepted in an assignment of lands whereof she is dowerable, the exception is void.

in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is, that dower defeats descent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descended as demesne. Gilb. on Dower, 395.]

In dower the tenant pleads that he by indenture granted a rent out of the said land to the demandant in recompence of her dower, which she accepted; the demandant confesses the grant of the rent, and her acceptance, but says that in the same indenture was a condition, that if the rent was not paid within such a time after it became due, the rent should cease, and the indenture be void, and shews a breach; and upon demurrer it was adjudged for the demandant, because it was pleaded as a grant; and also because it was upon condition; for rent assigned in recompence of dower, and which comes in lieu of the land, ought to be as absolute as the assignment of the land itself; and therefore the condition annexed is void; or if it should be good, yet it is only annexed to it as a grant, and upon breach thereof she is restored to her writ of dower.

It is a rule, that when the wife brings a writ of dower, and recovers, the sheriff ought to assign it by metes and bounds, if the

Moor, pl. 928.

Roll. Abr. 681.
Dyer, 343.
Plow. 529.

every one is
Roll. Abr. 682.
7 Co. 37.
Plow. 25. b.
2 Inst. 153.
Hob. 153.
Co. Lit. 34. b.
241. a.
[The dower-
refs holds of
the heir;
but by the
institution
of law she is

Cro. Eliz. 451. Went-
worth's case.
Roll. Abr. 684.
Co. Lit. 34. b.

Perk. 414.
Roll. Abr. 682.

Co. Lit. 14. thing recovered may be severed; and if the sheriff does not re-
Bendl. 87. turn seisin by metes and bounds, it is ill, (a) unless closes certain
But an are assigned by name, or a manor which is known, and certain,
assignment, though in a in lieu of dower of other manors.
different

manner, by the consent of the demandant may be good. *Vide* Roll. Abr. 683. [Sty. 276. According to the latter reporter, a special verdict found, that the tenant said to the widow thus, viz. *I do endow you of a third part of all the lands my cousin J. S. your husband died seized of.* Roll, C. J. to which Nicholas and Atk. justices, agreed, held, that it may be assigned generally of the third part in some cases, and the parties may agree against common right, and that here both parties agreed to take dower in this manner; but *Jermain e contra.* But *per* Roll, C. J. if the sheriff assigns dower, and does it not *per metes et bundas*, it is error, if it might have been so assigned; and where a feme cannot be endowed *per metes et bundas*, she may enter without assignment.] (a) For this *vide* Roll. Abr. 683. Perk. 332. Brook, 72. Co. Ent. 171.

Palmer 265. Upon recovery of dower, and seisin awarded, the sheriff re-
Vide Keb. turns, that he had assigned to the demandant for her dower of a
743. house the third part of each chamber, and had chalked it out to
The sheriff her; and this was held an idle and malicious assignment; and he
committed for refusing to make an equal allot-
ment of dower, and taking 6*ol.* to execute his writ of execution, and an information ordered against him; and Vern. 218, 219. 2 Chan. Ca. 160. That equity will relieve against a partial and fraudulent assignment of dower by the sheriff.

Perk. 411. The wife of a tenant in common shall not be endowed by
F.N.B. 149. metes and bounds, for she being in *pro tanto* of her husband's
Co. Lit. 32. estate, cannot have it in other manner than he himself had.
34. 37. and
vide Brownl. 127. and 3 Lev. 84. Sutton v. Rolf, in which it was adjudged that a writ of dower will lie against the heir of a tenant in common, before partition made; for otherwise they might perhaps make no partition at all, and so defeat the wife of dower.

3. By what Court.

Cro. Eliz. An assignment of dower by commission *de dote assignandâ* out
364. Stain- of the Court of Wards was held no bar of dower at common law,
field & Uxor but it ought to have been by writ *de dote assignandâ* out of Chan-
v. Viscount cery, the jurisdiction of which court is not given to the Court of
Bindon. Wards in such case by 32 H. 8. c. 46.

Dyer, 361. Sir Thomas Arundell being attainted of felony, and his wife's
Lady Arundell's case, dower saved by act of parliament, she brought her writ of dower
601. Co. against the Earl of Pembroke, and he making default after appear-
Ent. 173. ance, a termor prays to be received, and shews his lease after the
Le Record de coverture, &c. and the attainder, &c. and that E. 6. granted a
2 Mod. 18. commission under the seal of the court of augmentations, to as-
S. C. cited. sign the third part of the land of the said Sir Thomas Arundell
to his wife in dower; and shews further that, by virtue of the
commission, the third part of the rent reserved on the said lease
was assigned to her, and this assignment confirmed by letters pa-
tent under the great seal, and shews her agreement and accept-
ance thereof, and said that this suit was by collusion to defraud
him of his term. In this case it was held, 1st, That the court
of augmentations had no power to assign dower to the demand-
ant, or any other woman, but it must be in Chancery. 2^{dly}, That
the assignment of the rent was not warranted by the commission,
and

and then the confirmation could not make that good which was merely void; and it was adjudged for the demandant.

As to endowments in Chancery, it appears by our books, that in former times the widows of tenants who held of the king *in capite*, whose heir was in ward to the king, were to sue in Chancery by petition for their dower; and after office found that she was the tenant's widow, then she was to make oath in Chancery that she would not marry again without the king's licence; and upon that there went a writ out of the Chancery *de dote assignandâ* to the escheator, to assign to her dower of the third part of all the lands whereof her husband was seised, &c. but if the heir were of full age at the time of the tenant's death, and the king had the lands only for his premier seisin, then could she not sue in Chancery, because the king was not then guardian, but had the lands only to such special purpose; and therefore to remedy this, was the statute *de prerogativa regis*, c. 4. made, which gives power to the king to assign dower to them, though the heir were of full age at the time of the tenant's death: but this power was not so absolutely lodged in the king as to exclude them from suing at common law for their dower, by reason of the words *ſc vidua ille voluerint*, which left them at liberty in such case, either to sue to the king in Chancery, or if they thought fit to sue the heir in the Common Pleas. But if the king had committed the wardship to another *durante minore etate* of the ward, then also at common law the widow had election to sue either to the king in Chancery, because notwithstanding such commitment he still continued guardian; or she might sue the committee at common law, and recover against him, without making the king a party by *ayde prier*, or otherwise, which was ordained by the statute of *bigamis*, c. 3. for avoiding delays in such cases: and when she recovered against the committee, she took no such oath as when she sued to the king in Chancery: yet nevertheless she could not marry without the king's licence, it being against the policy of those times to permit such widows to marry whom they pleased, since then they might have brought in enemies or foreigners into the king's feud: and in the king's case the fines for alienation still continued.

Another prerogative the king had in those times, that if the heir of his tenant *in capite* entered before livery sued, this was looked upon as an intrusion, and his wife lost her dower by it, by the express provision of *prerog. regis*, c. 13. but this was meant only of intrusion after office found, which gave the king a title; for if he entered before office found, and died, his wife should be endowed.

Stanf. Prer.

16.

F.N.B. 164.

Brook, 66.

76.

2 Inst. 18.

Keilw. 133.

Brownl.

126.

Co. Lit.

33. b.

9 Co. 16, 17.

7 Mod. 43.

Stanf. Prer.

41.

Brook, 66.

Co. Lit.

30. b.

F.N.B. 149.

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

Perk. 318,
319.
F.N.B. 149.
Co. Lit.
31. b.

IF the husband seised of lands in fee exchange the same lands with a stranger for other lands, and die, the wife hath election to be endowed either of the lands given or taken in exchange, because her husband was seised of both during the coverture: but she shall not have dower of both; for that would be unreasonable.

Leon. 285.

Husband seised of lands in right of his wife, they both join in exchange of those lands with a stranger for other lands, which exchange is executed; then the husband and wife alien the lands taken in exchange by fine: two judges held, the wife after the husband's death might well enter into her own lands, notwithstanding the fine which was of the other lands; and resembled it to the case in *Dyer*, 385. where the husband after marriage made a jointure to his wife, and then they both levied a fine *come ceo*, &c. thereof a stranger and his heirs; and this was adjudged no bar of her dower, because the election to claim jointure, or dower, is not till after the husband's death: and in the principal case judgment was given for the wife.

Perk. 320.
(a) But if the tenancy escheat by the act of God, as by the death of a tenant, she shall have dower of the tenancy only. Perk.

If lord and tenant are by fealty, and 12*d.* rent, and the lord takes a wife, and after purchases the tenancy in fee, and dies, his wife hath election to be endowed, either of the seignory or the tenancy, because her husband was seised of both during the coverture: so, for the same reason, if the husband seised of a rent-charge in fee purchase the land whereout the rent is issuing, and die, his wife at her election may be endowed either of the land, or of the rent, and the husband being seised of both, during the coverture, cannot by his own (a) act alter the wife's dower.

321.* — * The reason is, because the seignory is determined, during the coverture by act of law, and it is not any disadvantage to the wife to be endowed of the tenancy, for if she be put out of possession of part or all, by more ancient title, the seignory shall be revived in part or in all, &c. *Vide Perkins*.

Perk. 324.

If the husband seised of lands in fee makes a feoffment thereof to a stranger in fee, rendering to him and his heirs 3*s.* rent, with clause of distress, and dies, and the feoffee endows the wife of the feoffor of the third part of the land for her dower, she shall hold it discharged of any rent, and the whole rent shall issue out of the residue of the land, because the wife shall be endowed of the best possession of her husband during the coverture; and the husband had the land discharged of the rent after the coverture; and yet because he had also an estate in the rent during the coverture, it seems she may be endowed of that, if she think fit, and waive her dower of the land; but the rent reserved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reserved, if she chooses the land.

In some cases, a woman shall be endowed a-new ; as where the lands, &c. assigned to her for dower, are lawfully evicted by elder title ; and therefore, if one be seised of two acres by good title, and another by disseisin, and marry, and die, and his wife be endowed of the acre had by disseisin, and after the disseisee enter into the said acre, now she shall be endowed of the third part of the two remaining acres : so, if the disseisee in such case had recovered the acre against the wife, she should have been endowed of what remained, and the entry or recovery being by title paramount to her title of dower, it is as if her husband had never been seised thereof ; and therefore she shall only recover the third part of what is left, and not a full recompence for the acre lost.

If one seised of two acres in one county marries, and enfeoffs a stranger of one acre with warranty, and hath issue, and dies, and the issue enters into the other acre, and the wife brings dower against the feoffee, who vouches the issue as heir, and he loses by default ; and thereupon the wife hath a conditional judgment, *viz.* against the vouchee if, &c. and the demandant sues execution against the heir, and after is evicted by elder title ; she shall have a *scire facias* upon the first recovery against the tenant, to be endowed of the two parts left : also upon such eviction she may be endowed *de novo* against the heir ; and the same law, if the endowment was in Chancery.

As to the *dos de dote*, if there be grandfather, father, and son, and the father, or, after his death, the son endow the grandmother, the mother shall not be endowed of the grandmother's thirds after her decease, because the grandmother's dower defeats the descent to the father, and by consequence, the father was seised of no more than two thirds of that land ; and therefore, the wife of the father was entitled to a third of these two thirds only, and no more : but if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed, either by recovery or assignment, there, the mother should be endowed of the grandmother's third after her decease, because by the feoffment the father was seised of the whole estate, which gave a title to his wife to be endowed of that whole estate : and though the grandmother recovered one third out of that estate during her life, yet such recovery doth not defeat the operation of the livery, since by that conveyance the reversion of that third is claimed ; and, by consequence, the mother shall be endowed of that third when it falls in possession, since the father was actually seised of it during the coverture, by virtue of such livery. If there be grandfather, father, and son, and the two first die, and the mother be endowed by the son of a third part of the whole, either by assignment *en pais*, or upon a recovery in a writ of dower, and the grandmother bring a writ of dower against the mother, and recover, she leaves the reversion in her ; for the dower was vested in the mother by the assignment or recovery, and is only defeated during the life of the grandmother, whose estate as to the mother is less than her own estate ; and, therefore,

Perk. 419.
F.N.B. 149.
Roll. Abr.
684.
4 Co. 122.

Perk. 321.
Roll. Abr.
684.
Brook, 65.
9 Co. 17.

Perk. 315.
516.
4 Co. 122.
Bustard's
case.
F.N.B. 149.
Roll. Abr.
677.
Co. Lit.
31. 42. 2.

therefore, the reversion is in the mother, and she, after the grandmother's death, may enter into that third recovered from her; and by consequence, the heir may re-enter into the second dower assigned to the mother, upon such recovery against her by the grandmother; for she cannot have both.

Roll. Abr.
677.

A. seized of land marries *B.*, and aliens to *C.*, who marries *D.*, and then aliens to *E.* and dies, and after *D.* is endowed, and then *B.* hath dower assigned to her of the third part of all the lands, and brings a *præcipe* thereof against *D.*, who vouches to warranty *E.*, who counterpleads upon the matter, and says that *D.* ought not to be endowed, *quia non potest habere dotem de dote*; and adjudged accordingly.

Hitchins v.
Hitchins,
2 Vern. 403.

[Lands, subject to a title of dower, were devised to a person in fee who died leaving a widow; this widow sued for her dower, and recovered a third part of the whole without any regard to the title of dower in the widow of the testator, who did not put her claim in suit: it was holden by the court, that the testator's widow not having recovered her dower, it was to be laid out of the case, and the dower of the devisee's widow was not *therefore* to be looked upon as *dos de dote*.]

(F) What shall be a Bar of Dower, and what not: And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after: And herein of Elopement, and Detinue of Charters, or Heir.

1 Inst. 349.
Perk. 376.

IF a recovery be had against the husband by collusion, this shall not bar the wife of dower; as, if the recovery be by confession or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining them: but it seems to have been a very great doubt whether a recovery by default should not be a bar; and the better opinion being that such recovery was a bar at common law; therefore the statute of *W. 2. c. 4.* was made, which ordains that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the dower shew his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her dower, notwithstanding such recovery by default against her husband.

Perk. 379.
380.
Roll. Abr.
681.

So, if the husband make a feoffment in fee, and dis-

By the statute *W. 2. c. 4.* it appears, that if the recoverer had right, then the wife is barred; therefore, if the heir of the disseisor be in by descent, and the disseisee enter upon him, and marry, and the heir of the disseisor recover by default or reddition in a writ of entry, in nature of an assise, and the husband die, his wife shall not have dower, because he, who recovered, had right to the possession by the descent: *aliter*, if this disseisin, descent, &c.

ſc. were after marriage, becauſe the huſband was ſeiſed before of a rightful eſtate during the coverture, whereof his wife had title of dower, which cannot be defeated by the diſſeiſin, deſcent, and recovery, which all happened during the coverture.

ſeiſe the feeſſee, who recovers in aſſiſe againſt him, the wife ſhall

not falſify this recovery directly, but ſhe may ſay, that long time before her huſband was ſeiſed, *que lui dower poit*, &c. Brook, 22. 38.

If a recovery be againſt the huſband by verdict, the wife ſhall not falſify in the point tried; but ſhe may ſay, that he might have pleaded a better plea, viz. a releaſe of all actions, or of all the right of the demandant; or ſhe may confeſs and avoid the recovery, but cannot falſify in the point tried againſt her huſband.

2 Inſt. 349. Perk. 382. Brook, 24. vide Perk. 383. which ſeem cent.

If in a *præcipe*, brought againſt the huſband, he loſes upon a dilatory plea, as upon non tenure, jointenancy, miſnomer of the town, &c. the wife may falſify upon a writ of dower brought, by ſhewing that the demandant had no right; but if he had right, ſhe cannot falſify the recovery, by ſhewing that her huſband might have pleaded jointenancy, miſnomer, &c. for theſe would have been only in abatement of the writ, and make nothing to the right: but if ſhe ſhews that her huſband was tenant of the land recovered, and that the demandant had no right or cauſe of action, but jointly with a ſtranger, which ſtranger by deed *in cur. prolat.* releaſed all his right to the huſband before the action brought; this is a good falſification of the recovery for one moiety of the land recovered.

Brook, 26. Perk. 381. 385, 386. A recovery in a *ceſſavit* ſhall bar the wife, Perk. 389. If the huſband aliens in mortmain; and the lord enters, &c. whether this be a good bar? Perk. 390.

If the huſband levy a fine with proclamations of his lands, and die, his wife is bound to make her claim within five years after his death; otherwiſe ſhe ſhall be debarred of her dower; for though her title of dower was not conſummate at the time of the fine levied; yet it being initiate by the marriage and ſeiſin of the huſband, the fine begins to work upon it preſently after the huſband's death; and if ſhe does not claim it within five years after, ſhe ſhall be barred.

2 Co. 93. 10 Co. 49. 99. 3 Inſt. 216. Hob. 265. Moor, pl. 154. 379. Dyer, 224. 13 Co. 20. 2 Roll. Rep. 69. 409.

all againſt Plow. 373. Vide 3 Leon. 50. By which it appears that though ſhe brought her writ of dower within five years; yet becauſe ſhe did not purſue it till after fix years were paſt, it was adjudged that ſhe could not by a new writ revive her ancient claim, which was barred by the five years laſt ed after the huſband's death; and it was held, that aſſignment of dower in the court of wards was no ſufficient claim of dower, becauſe ſhe could not have a writ of dower there.

If the huſband and wife join in levying a fine, or ſuffering a common recovery, this ſhall bar her of her dower totally, becauſe in both caſes ſhe is examined upon record by the judges, as to her conſent; and ſhe having nothing in the lands in her own right, her joining in ſuch acts can be to no other purpoſe but to bar her dower: but if the huſband be ſeiſed in fee, and a ſtranger levy a fine to him and his wife *ſur conſance de droit come ceo*, &c. of theſe lands, and the huſband and wife grant and render the ſame land to the ſtranger and his heirs; it ſeems the wife ſhall not be barred of her dower, becauſe ſhe is not examined in this caſe, as ſhe is in the other; and therefore, if this fine *ſur grant* &c. render

Plow. 515. Eare v. Snow, 10 Co. 49. Cro. Eliz. 29. Brook, 77.

be

be pleaded in bar, she may say that she had nothing in the land at the time of the fine levied.

Bulst. 1st 3.
Leon. 285.
Dyer, 358.

If a jointure be made to the wife during the coverture, and after the husband and wife levy a fine thereof; yet this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before; and then the fine, levied of the jointure before her time for election of dower was come, can be no bar to her electing of dower when it is come.

Perk. 350.
F.N.B. 149.
Moor, pl.
103. If lessee
for marries
the lessee for
years, and
dies, it is

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time.

said she shall have dower during the term; but it should seem she can have no fruit thereof till the term ended, she having the whole already for years, unless upon recovery of dower the term be merged for the third part so recovered in dower.

Perk. 352,
353.

3 Co. 27.
Though by
this contrivance
all women may be
defeated of
their dower
as to estates
purchased
after the marriage.

If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof: but if the estate be made to the husband and the wife for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in this case disagree, because the estate upon the husband's death is determined and gone.

By the common law, a woman could not be barred of her dower by any assignment or assurance to her of other lands, or of a rent issuing out of other lands, whereof she was not dowerable (except in the case of dower *ad osium ecclesie*, or *ex assensu patris*), for whether such assignment or assurance were made by the husband before marriage or after, or by the heir after his death; and they were expressly said to be in full bar and recompence of her dower; yet might she recover her dower notwithstanding; for she having a right to be endowed of the third part of all her husband's lands vested and fixed in her immediately upon the marriage, and the husband's feisin thereof, this right like all others could not be transferred or extinguished, but by a release thereof; and if no such release were made, it continued still in being, for want of the proper means to destroy it; and if it still existed, her remedy was open to recover and reduce it into possession.

4 Co. 1.
Vernon's
case.
Dyer, 91.
Co. Lit.
31. 36.
Brook, 97.
2 Brownl.
132. *Vide*
pus, title
Jointure.

Moor, pl.
103.
Co. Lit.
36. b.

[(a) A better reason
than this is,
that the
whole of a
will concerning
lands must be in writing,

One devises lands to his wife during her widowhood, and dies, she marries again, and brings dower; and this devise was pleaded in bar; and it was held no bar. 1st, Because a will imports a consideration in itself, and cannot be averred to be in bar of dower, without it be so expressed (a). 2^{dly}, Dower cannot be of less estate than for life (b). And a third reason may be, because her right cannot be barred by collateral recompence.

and no averment ought to be taken out of the words of the will.

Will. 4 Co. 4. a. (b) Moore, in the case referred to, expressly states that this second reason was disallowed, and such a devise holden a bar of dower by two judges, Weston and Bowles against Dyer, J.]

In ejectment the case was, that a man devised his land to his wife till his daughter *M.* should arrive at the age of 19 years, and after to *M.* in tail, remainder over in fee, and devises farther that *M.* should pay, after her age of 19 years, to his wife 12 *l.* *per annum* in recompence of her dower; and if she failed in payment, that then his wife should have the land for her life: the wife, before the daughter came to the age of 19, brought a writ of dower, and recovered a third part, and after the daughter came to 19, and for non-payment of the 12 *l.* the mother entered; and the question was, whether her entry was lawful? It was argued that it was, and that by bringing her writ of dower she had not waived the benefit to have the lands by the devise, because then she had no title to it, but her title accrued after for non-payment of the 12 *l.* But it was adjudged, that she having recovered a third part in dower, she should not have the rent by the will; for it is against the intention of the will that she should have both, and the acceptance of one is a waiver of the other.

Cro. Eliz.
128.
Golling v.
Warburton.

One seized of lands in fee held in socage, and of other lands in tail held *in capite*, devises by will in writing the third part of all his lands to his wife in recompence of her dower, and dies; she enters into the third part of the fee-simple lands without bringing her writ of dower; and held, that she was barred from claiming any more.

Dyer, 220.
4 Co. 4.

A man marries an orphan of *London*, who had a great portion in the orphan's court there; the husband dies before taking it out, but makes his will, and devises this money to his wife, provided that she should not claim her dower; and yet after his death she brought her writ of dower; and thereupon a bill was brought in Chancery to compel her to release her dower, or renounce the devise, and for an injunction in the mean time; but to no effect, the money belonging to her in her own right, by the custom, for want of the husband's altering the property thereof; and though he had, yet it was admitted it would have been no bar of dower, being totally collateral thereto, though it should seem she would in such case have (a) forfeited the money by suing for dower.

2 Vent. 342.
Phaellant's
case. Chan.
Ca. 181
S. C.
(a) If lands,
money,
goods, &c.
are devised
to a woman,
without
saying in
lieu of satis-
faction of
dower, &c.
yet the wife

shall have both, because a devise implies a consideration; but if it be said in lieu or recompence of dower, there the wife cannot have both, but may waive which she pleases; and this has been often adjudged in Chancery. 2 Chan. Ca. 24. 2 Vern. 365. Abr. Ca. in Eq. 218, 219. [See *acc.* Lawrence v. Lawrence, 2 Vern. 365. 1 Eq. Ca. Abr. 218. 2 Freem. Rep. 234. 1 Br. P. C. 591. Lemon v. Lemon, Vin. Abr. tit. Devise, (T. c.) pl. 45. Hitchin v. Hitchin, Pr. Ch. 133. Gaton v. Hancock, 2 Atk. 427. Tinney v. Tinney, 3 Atk. 8. Ingleton v. Northcote, *id.* 436. Ayres v. Willis, 1 Vez. 230. Charles v. Andrews, 9 Mod. 152. Broughton v. Errington, 7 Br. P. C. 12. Fitt v. Snowden, 1 Br. Ch. Rep. 292. Pearson v. Pearson, *id.* *ibid.* However, notwithstanding these cases, devises have been frequently deemed a satisfaction of dower, where the will has been silent, on account of strong and special circumstances; as, where allowing the wife to take a double provision would be inconsistent with the dispositions of the will. Arnold v. Kempstead, Ambl. 466. and 1 Br. Ch. Rep. 292. Villa Real v. Lord Galway, Ambl. 682. and 1 Br. Ch. Rep. *ubi supra*. Jones v. Collier, Ambl. 730. Wake v. Wake, 3 Br. Ch. Rep. 255. Boynton v. Boynton, 1 Br. Ch. Rep. 445. In such case the widow must make her election. But she shall not be put to this election, unless there be a declaration plain, or a clear incontrovertible result from the will that the testator meant that she should not take both. Foster v. Cook, 3 Br. Ch. Rep. 347. French v. Davies, 2 Vez. jun. 572. Nor shall she in any case be obliged to make her election till the account be taken, and it appear out of what estates she is dowable, Boynton v. Boynton,

v. Boynton, *ubi supr.* nor will she be precluded from making it by accepting an annuity for three years under the will, she during that time claiming both her dower and the annuity. Wake v. Wake, *ubi supr.*]

Co. 112.

Co. Lit.

265.

8 Co. 151.

Edward Al-
tham's case.

A woman had title to dower of lands, whereof one is tenant for life, remainder to another in fee; the woman releases to the remainder-man all her right of dower: this is a good bar in dower brought against the tenant for life, though she had no present cause of action against him in the remainder, till after the death of the tenant for life: so, of a release to tenant for life, he in the reversion or remainder shall take advantage thereof, because her dower accrues not only out of the estate for life, but also out of the reversion or remainder, and both as to her make but one estate; so that if she discharges either, she discharges the whole.

Cro. Jac.

151.

In dower the tenant pleads a release from the demandant to such a one tenant *in possessione tenementorum. predict. existent.*, and because not said that he was *tenens liberi tenementi*, it was held no plea; and adjudged for the demandant; for a release of dower to tenant for years, or at will, can be no bar of dower, because she cannot demand it against them.

2 Inst. 436.

But this
case may
admit of so
many distinctions,
that it is hard to make law of it, as it is put, and harder yet, that it should be a bar of her just right. And see the writ *de ventre inspiciendo*.

If a woman pretends herself *ensient* by her husband, when in truth she is not; by which the heir is disturbed of his inheritance; she shall lose her dower if she acknowledge it before the justices.

Davies, 30. b.

Brook, 53.
tit. Customs.

By the custom of some places the wife shall be barred of her dower, if she receives part of the money for which her husband sold the land, whereof she was otherwise dowable: so, by the custom of some places, if a widow marries, she shall have no dower of her second husband's lands.

2 Inst. 435.

Co. Lit. 32.

F.N.B. 150.

Roll. Abr.

680.

[(a) Nor is
a jointure
now forfeit-
able by
elopement
or adultery.

As to elopement, this was no bar of dower at the common law (a), though a divorce were sued and obtained for the adultery: but now by the (b) statute of W. 2. c. 34. it is expressly provided that in such case the wife shall lose her dower; and though she does not go away *sponste*, but is taken against her will, yet if after she consents and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of going away.

Sidney v. Sidney, 3 P. Wms. 268. Neither will the circumstance of a wife's living separate from her husband in adultery prevent a court of equity from decreeing a specific execution of articles in her favour. Blount v. Winter, in Canc. July 19, 1781.] (b) The words of the statute are *si uxor sponte relinqueret virum suum, et abierit et in rebus cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui, si super hoc convincatur, nisi vir suus sponte et absq; coercionis ecclesiæ cum recedat, et secum cohabitare permittat, in quo casu restituatur ei ælio.* Vide Dyer, 107. a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband, and there held, that the defendant cannot give in evidence any other elopement but that pleaded.

Perk. 354.

Brook, 12.

cont.

Roll. Abr.

680.

2 Inst. 156.

Co. Lit. 32.

13 Co. 23.

If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but if after such ravishment she consent to remain with him, she shall lose it: so, if she voluntarily go away from her husband, though she remain all her lifetime with the adulterer against her will, or if she remain not with him, but he turn her away, yet shall she lose her dower: but if she

she be reconciled as the statute ordains, then she shall be endowed, though the husband aliened * the land in the mean time. If she elope, and live in adultery on

any other the manors or lands of her husband, she shall lose her dower. 2 Inst. 436. But *vide* Perk. 355. F. N. B. 150. Roll. Abr. 670 *cont.* For the husband is to take care that none such live there. If the husband be reconciled by church censures, yet she shall lose her dower, but cohabitation is sufficient evidence of a reconciliation. Roll. Abr. 680. — * Co. Lit. does not warrant this part of the position.

If a man grants his wife with her goods to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of living with him in adultery. And where such a grant was pleaded, it was holden, 1st, That the grant was void. 2^{dly}, That it did not amount to a licence; or if it did, that it was void. 3^{dly}, That after the elopement there shall be no averment admitted *quod non fuit adulterium*, though the grantee and the woman married after the husband's death. And though in this case they brought sentence of purgation of the adultery from the spiritual court, yet it was not allowed against such presumption. 2 Inst. 435. Roll. Abr. 680. Dyer, 106. in margine.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interest which she can have in him as her husband, and also persuade her to marry again, which she does with one who has notice that her first husband is alive, but she herself has no notice of it; though she lives in adultery with this man, and though her husband be not out of the realm, nor beyond the seas, so that she ought to have taken notice of his being alive, yet because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such elopement as will bar her of her dower. Roll. Abr. 680. Green v. Harvey.

It is a good plea in bar of dower, that the demandant detains from the heir such charters, shewing them in certainty, unless they are in a bag sealed, or box locked; and then it is sufficient to say that she detains from him such bag or box of charters. But if the bag or box be open, then the defendant must shew the charter in certain, and after such plea he must add, that if she will deliver them to him, he is, and always hath been ready to render her dower. Upon this if she delivers them to him, she shall have judgment for her dower presently; but if she denies such detainer, and it be found against her, she shall be barred for ever. And it is to be observed, 1st, That these charters ought to concern the land, or the reversion of the land whereof dower is demanded. 2^{dly}, That such detainer is no bar of dower for more lands than the charters concern. 3^{dly}, That none can plead this plea but the heir, and not a stranger, who is tenant of the land, though he hath the charters conveyed to him. 9 Co. 17, 18. Plow. 85. Perk. 356. 360. 5 Co. 75. Roll. Abr. 679. Brook, r. 4. 32. 41. 47. 48. 53. 57. 67. Hob. 39. 113. 115. Bend. pl. 215. Dyer, 27. pl. 42. 232. pl. 50. The reason why such detinue of charters is a

good plea for the heir seems to be, because the inheritance by law is cast upon him immediately after his ancestor's death, without any act of his concurring; and therefore he cannot provide against the injury done him by any precaution or covenant whatsoever: but a stranger, who comes to the land by conveyance, and his own act, ought to take care to have all the deeds and writings, necessary for the defence of his title, delivered to him at the same time, or to secure himself by proper covenants; and if he has not so done, it is his own folly; and he shall take no advantage thereof by pleading it in bar of the demandant's right, but must pursue his remedy by an action of detinue, &c. In what cases the

heir himself shall be considered as a stranger, and cannot plead detinue of charters, *vide* 9 Co. 18.
Perk. 258. Dyer, 230. pl. 52.

Perk. 359. If two coparceners are of land, and after partition made between them the mother brings dower against one of them, she [the daughter] may well plead detinue of charters, because the charters concern her inheritance, though they do also concern her sister, who both make but one heir.

Perk. 360. If the daughter enter into the land after her father's death, who left his wife *ensent*, and the wife bring dower against the daughter as heir, she cannot plead detinue of charters, because it may be that the wife is *ensent* with a son, who will be heir, and therefore may justly detain the charters for him.

Perk. 360. Detinue of a transcript of a fine is not a sufficient cause to detain dower, because another transcript may be had in the treasury.
Roll. Abr. 679. cont.

Salk. 252. Detinue of charters is no good plea after imparlance : resolved upon a demurrer to such plea in the court of *Durham*, and confirmed on a writ of error in *B. R.*
pl. 2. Burdon v. Burdon.
Comb. 183. S. C.

Dyer, 230. The guardian in chivalry may plead detinue of the heir, because the wardship of the heir belongs to him : but he cannot plead detinue of charters, because they belong to the heir for defence of his inheritance. And the reason why he is allowed to plead detinue of the heir in bar of dower seems, because the writ of dower lies only against him during the minority of the heir ; and since the demandant does wrong in detaining from him the wardship, it is but reasonable she should be delayed of her right against him, till she restores it ; and therefore he concludes his plea, that if she will deliver to him the ward, he hath been and still is ready to render her dower : so, if the wife takes away the ward, and delivers him to another, so that the guardian cannot have him, this is a good cause to bar her of her dower : so, if the guardian comes in by voucher, he may plead the same plea : and this is a good plea in bar of dower *ad ossium ecclesie*, or *ex assensu patris* ; if the wife does not enter, but brings her writ, claiming it as dower, whereof she was *nominatim dotata* by her husband ; and in these cases if she cannot render the ward unmarried she shall lose her dower, because she hath thereby deprived the guardian of what was most valuable, *viz.* the marriage of his ward.

Perk. 362. If a woman, as mother to the heir, brings him up, and one claims the wardship of him as guardian in chivalry, and takes him from her ; this is no cause for the rightful guardian to detain her dower, because she was not in fault.

Perk. 363. If the mother takes the heir out of the possession of those who had the education of him, and they retake him, so that she cannot deliver him to the guardian, this is a good cause to detain her dower for the wrong done in the elioignment at first, when the wardship did not belong to her.

(G) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.

THE wife shall hold her dower discharged of judgments, recognizances, statutes, mortgages *, or any other incumbrances made by the husband after marriage, because after his death her title, which is now consummate, has relation to the marriage and seisin of her husband, which were before the incumbrances: but if she joins in a grant of a rent by fine out of such land, or makes a lease for years, rendering rent by fine to the husband and his heirs, she shall hold her dower subject to such rent or term, because she was examined upon the fine, and by such means might bind her own inheritance.

4 Co. 64.
65.
* The widow of a mortgagor not barred of her dower, if she did not join in the mortgage.
4 W. & M.
10 Co. 49.

If the husband die indebted to the crown, yet his wife's dower is by law privileged from any distress; and if she be distrained, she may have a writ to the sheriff, commanding him not to distress her, or to re-deliver the distress, if any be taken, unless such debts were contracted before her title of dower accrued, for then it will be liable thereto. And the reason she shall not be distrained for debts to the crown, contracted after the marriage, seems to be, her prior title by relation.

Co. Lit.
37. a.
F.N.B. 150.
per tot.

If the husband seised of three manors grant a rent-charge out of all, and die, and the wife have one manor assigned to her by the heir in lieu of dower of all the three manors, she shall hold it charged for a third part of the rent, because this endowment was against common right, by which she ought to have had the third part of each manor: but if she had recovered her dower, and such assignment had been made by the sheriff, she should have held it discharged, because she pursued the proper means to obtain it clear, and then it is not reasonable the sheriff's act in mis-executing the judgment of the court should prejudice her, especially when the heir is not more hurt by the whole charge falling upon the two manors, than he would if it had fallen upon two parts of all the three manors.

Ferk. 332.
232.
Roll. Abr.
683. 684.

A wife may demand dower of a rent-charge granted to her husband and his heirs, without shewing the deed, because the deed belongs not to her, but her estate is created by the law.

Plow. 41. a.
81. b.

Tenant in dower is allowed by the statute of *Merton*, c. 2. to devise the corn growing upon the land at the time of her death, of which before that statute it was doubted if she might; and the word *blata* there extends likewise to hemp, flax, and other things, which grow by the industry of man, but not to grass, trees, &c. which come *suapte natura*.

2 Inst. 81.
Kellw. 125.

In dower against an infant who makes default upon the *grand capz* returned; it was held *per tot. cur.* that judgment shall be

Cro Jac.
111. 392.
Cro. Eliz.

307. 331.
557. 567.
Moer, pl.
465. 1148,
1147.
2 Brownl.
113. Cro.
Liz. 638.
2 Leon. 59.
189.

given upon the default: for the infant shall not have his age in dower, which being but for life the widow may be totally defeated of it by his frequent defaults: though some of the books say, that if judgment be given upon the *grand cape* before appearance, this is error: *secus*, if he appears by guardian, and after loseth by default; for then if any default be in the guardian, he shall recover against him in a writ of *disceit*: and other books doubt if the infant shall not be allowed his age in dower; but the contrary seems the more reasonable opinion.

Cro. Jac.
392. Moer,
pl. 1148.
S. C. be-
tween Her-
bert and
Binion.

In error to reverse a fine levied by the plaintiff and her husband, the heir is summoned as tertenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, shewing that he was entitled to have dower before the fine levied, and now is barred of her dower by this fine, which is erroneous, and sets forth the errors, and seeks to be restored to her writ of dower; but upon demurrer and solemn argument it was held in this case, that the parol should demur.

(H) To whom the Tenant in Dower shall be attendant, and by what Services.

Perk. 424,
425.
9 Co. 135.
But though
in most cases
she shall be
attendant to

AND here the rule is, that the dowress is to be attendant to the reversion dependant upon her estate, for the services which were paid during the life of her husband, unless the original feudal contract increase such feudal services, and then she shall be an attendant for the services increased.

him in the reversion by the third part of the services, by which he holds over, yet may she be attendant to others, and by other services; and therefore if lord, mesne and tenant are by knights service, and 3 s. rent, and the tenant marries, and dies, his issue within age, and the mesne take the ward of the body and land of the heir, and endows the wife, she shall be attendant to the mesne by 1 s. rent; and if he die during the minority of the heir, then she shall be attendant to his executors in the same manner till the full age of the heir, because till then the profits belong to the guardian and his executors in their own right; but for this *vide* Keilw. 124. 129. Roil. Abr. 685. Brook, 64.

Perk. 427. If he in reversion grant it over to another, and the tenant in dower attorn, she shall be attendant to the grantee by her own agreement.

Co Lit. 46.
a. 711. b.
Brook, 64.
Perk. 431.

If one makes a gift in tail, rendering 20 s. rent, and dies, and the donee marries and dies without issue, and his wife is endowed by the heir of the donor, she shall be attendant to him for a third part of the rent, though the estate-tail and the rent are both determined; for her estate being a continuance of her husband's, and the donor thereby kept out of possession for a third part during her life; it is but reasonable she should pay her proportion of the rent reserved: so, though the lord had released to the tenant donor all his feignory, yet the wife of the donee should be attendant in the same manner, by reason of the express reservation; and she is a stranger to the release.

Perk. 434.

If tenant holds by fealty, and a horse of 40 s. price, his wife being endowed, shall be attendant to the heir by the third part of the 40 s. only; but if it was of a horse to be rendered yearly, she should render to the heir a horse every third year.

(I) Of the Proceedings and Damages in Dower
unde nihil habet.

BEFORE the statute of *Marlb. c. 12.* in dower *unde nihil habet*, ^{2 Inst. 124.} there were days of common return, as in other real actions, which was mischievous to the wife, by reason of the long delay, she claiming but an estate for life; but this is now remedied by that act, and four days of return in the year are given at least, and that act extends likewise to the vouchee, but not to a writ of right of dower, nor to dower *ad osium ecclesie*, nor *ex assensu patris*; but *32 H. 8. c. 21.* extends to, and gives the same return in every writ of dower.

In dower the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reversion in one *A.* who at the day in bank ought to be received, and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance seems idle. ^{Brownl 126.}

In dower of lands in *L., M.,* and *N.*, the sheriff returns *plegii de proseq. A., B., C., D.* and the names of the summoners *E., F., G., H.*, and that after the summons made, and 14 days and more before the return of it, at the most usual church door of *L.* where part of the lands lay, such a *Sunday* after sermon ended, he publicly proclaimed all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and indorses his name to the return; and exception was taken to this return, because proclamation was not made at all the church doors: but *per cur.*, proclamation at any of the church doors is sufficient: but the return was held ill, because he says he had proclaimed all and singular the things in that writ contained, without saying what. ^{Hob. 133. Allen v. Walter. The proclamation by the 31 Eliz. c. 3. ought to be at the parish-church door, though it be in another county than where the land lies. Cro. Eliz. 472. Error}

of a judgment in dower, in that the proclamation is said to be at *H.* in the spring, and it doth not appear that it is within the parish of *W. H.*, where the demand is: but by Weston for the defendant, this is cause why no grand cape should issue, by *31 Eliz. c. 3.*, but it is no cause of error; and the judgment was affirmed *nisi*. ^{Keb. 529.} Upon a writ of summons in dower it was returned *ad osium ecclesie proclamari feci juxta formam statuti. secundum exigent. brevis*, and held good by two justices against one, though what the error was does not appear. ^{Keb. 680.} On a motion for a superseas, to stay proceedings on a grand cape in dower, *quia errorice emanavit*. 1st, Because the return of the summons was not according to the statute of *31 Eliz. c. 3.* for the statute is after summons. 2dly, The land lies in a vill called Heroick, and the return is of a proclamation of summons at the parish church of Halifax, and it does not appear that the lands lie within the parish. 3dly, The return is *proclamari feci secundum formam statuti*, and it is not returned to have been made upon the land; for all which causes it was held erroneous, and the grand cape was superseided. ^{Mod. 197. Furnis v. Waterhouse.}

Error to reverse a judgment in dower at the grand sessions in *Wales*: it appeared by the record that the tenant appeared at the return of the summons, and day was given over, *Et altunc venit per attornat. Et nihil dicit in barram*; whereupon *considerat. est quod tertia pars terrar. Et tenement. capiatur in manus dñi regis*; and upon day given *ad audiend. judicium*, judgment was given *quod recuperet*, and error assigned that they ought not to have awarded a

Vent. 60.
Williams
v. Gwinn.
2 Saund.
46. S. C.
2 Keb. 430.
551. 60
S. C.

petit cape, because the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance to answer the default, and demand: but it was held no error, being only an awarding of more process than needs be, and it was an advantage to the tenant by delaying the demandant; and *per Tawfelen*, if erroneous, they might now give judgment upon the *nihil dicit* in this court.

Vent. 267.

Lomax v.

Armoror.

2 Lev. 93.

123. S. C.

3 Keb. 277.

326. 421.

S. C.

Brook, 56.

Error of a judgment in dower in *Newcastle-court*; because the proceeding was by plaint, and no special custom certified to maintain it; and it was held error, because pleas of frank tenement cannot be held without original writ, unless there be a special custom for it.

In dower, if tenant makes default, by which *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made.

Leon. 62.

Mitchell v.

Hyde.

In dower, one appears upon the *grand cape*, who in truth was but lessee for years, and so might plead non-tenure; and if now he might wage his law of non-summons, and the writ be abated, was the question? because it was said that by wager of his law he affirms himself to be tenant: but two justices only in court held, that he would be at no mischief, for being but lessee for years, if judgment and execution were against him, he might, notwithstanding, enter upon the demandant. Another matter was, that where the writ of dower was, *de tertiâ parte rectoriæ de D.*, and the *grand cape* made upon it accordingly; yet the sheriff by colour thereof took the tithes severed from the two parts, and carried them away; and *per cur.*, this is not such a seifure as is by the writ intended, for he ought only to have seifed generally, but not to carry them away; and the court had a mind to have committed him for a misdemeanour.

3 Lev. 167.

Whelpdale's

case.

In dower, tenant demands the view, demandant counterpleads the view, because her husband died seifed, & *hoc parat. est verificare & petit judicium & dotem suam de tenement. prædict. sibi abjudicari*; tenant *protestando*, that the husband did not die seifed, demurs and shews for cause that the counterplea *male concludit*, for it ought to have been & *petit judicium & quod tenens de visu excludatur*, and the counterplea is but dilatory, and ought not to conclude peremptorily for final judgment; and of this opinion was *Levinz*, but two other justices held it not ill: also, the demand was of three messuages, &c. where it ought to have been only of the third part of them; and if this might be amended was doubted.

3 Lev. 220.

Farris &

Ux. v.

Rich.

Note: In

dower the

view is

ouster by

W. 2. c.

48. in these

words, In

In dower, *unde nihil*, &c. tenant demands the view, demandant counterpleads it, because the husband *alienavit tenement. prædict.* to the tenant & *hec*, &c. and it was demurred, because *alienavit* does not shew what estate he aliened, for it may be a lease for years: but *per cur.*, alienation implies all the estate which he had, and the statute *W. 2. 48.* ousts the view, where the husband aliens to the tenant, or any of his ancestors; and this is in the very words of the statute; and a *respondeas ouster* awarded, but no notice

notice taken whether the view was allowable in dower *unde brevis de
nihil habet.* *dote cum
petatur dos*

de tenemento quod vir uxoris alienavit tenenti aut ejus antecessori, cum ignorare non debet tenens quod tenem.
vir uxoris alienavit sibi vel antecessori suo, licet vir non debeat scire, nihilominus tenenti de cetero non erit ejus
concedendus; and my lord Coke in his exposition thereof says it extends not to a writ of dower unde nihil
habet, for thereon no view lay at the common law, because the demandant should not be delayed, having
nothing to live on; but it extended to other writs of dower, whether for dower at common law, ad ejus
ecclesiam, ex assensu patris, or by the custom; and where the view has been granted, it is to be intended in
those cases, for which vide 2 Lev. 117. 3 Keb. 565. Dyer, 179. pl. 41. 2 Roll. Abr. 725.
2 Inst. 481.

At the common law, before the statute of *H. 1. c. 49.* if a woman had accepted any part of her dower, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of dower; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county. This being a great mischief to the woman is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her dower.

In dower the tenant pleads, that after marriage the husband had settled other lands on the demandant for life, for her jointure, and that she after his death agreed thereto, and entered accordingly; the demandant replies, that it was a voluntary settlement of her husband, and traverses that it was for her jointure; and issue thereupon; and at the *nisi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment, that the demandant have seisin; and the demandant suggests that her husband died seised, and prays a writ to inquire of the damages, returnable such a day; the sheriff returns that he hath delivered seisin of the lands particularly, and also an inquisition which finds that the lands are worth *114l. 11s. per annum*, and that her husband had been dead six years and three quarters, and that she had sustained damages *occasione detentionis dotis ultra valorem pred. & ultra misas & custag. sua 195l. & pro misis & custag. 20s.* and upon this the demandant *gratis* releases the *195l.* and demands judgment only for the *20s.* and judgment is given that the demandant recover *tam valorem tertie partis predict.* from the death of her husband, which came to *257l. quam the 20s. and 11l. de incremento, in toto 269l.* and the tenant brings error, for that the damages being released by the demandant, there ought to have been no judgment against him for the value of the land. But the whole court resolved, that the release was only of the damages sustained *occasione detentionis dotis*, and not of the mesne profits of the lands, for they are two distinct things, as appears by *Co. Lit. 33. a. Rast. Entr. 237.* where the writ is to inquire not only of the value of the land, but also of the damages *ratione detentionis*; and the judgment is always entered accordingly, and a *fieri facias* lies for the damages; and therefore the judgment was affirmed.

Raym. 366.
Harvey v.
Harvey.

Note: The mesne values and damages are to be recovered against the tenant in a writ of dower, and so it appears in the judgment of this case, and in *Co. Lit. 33. a.* and *Bendl. 155.*

Co. Lit. 32.
Dyer, 284.
Pl. 33.
Yelv. 112.
Dr. and
Stud. lib. 2.
c. 13.
f. 166.

2 Inst. 80.
The words
of this sta-
tute are,
*Quod viduæ
quæ post
mortem vir-
orum suo-
rum expel-
lantur de
domibus suis,
& dotes suas
vel quaren-
tenam suam*

habere non possunt sine placito, quod quicunque deficiaverit eis dotes suas vel quarentenam suam de tenementis de quibus viri sui obierint seisciri, & ipsæ viduæ postea per placitum recuperaverint, si ipsi defore. de injusto deforciamento convicti fuerint, reddant eisdem viduis damna sua, scilicet valorem totius dotis eis contingens a tempore mortis virorum suorum usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam inde recuperaverint.

Co. Lit. 32.
[(a) But
the statute
is express
that the
widow shall
have her
damages,
*viz. volo-
rem totius
dotis et con-
tingens a
tempore mor-
tis viri sui,*
and in a
modern case,
which under-
went a

Damages must be after demand of dower (a), for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which cannot divide without the concurrence of the wife; but a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath been always ready, and still is, to render her dower; she may plead such request; and issue may be taken upon it: but the feoffee of the heir cannot plead *tout temp. priss*, because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits, and damages against him, and if he hath not provided his indemnity and recompence against the heir, it is his own folly.

great deal of discussion, damages were awarded her from the death of her husband, though she had delayed bringing her writ of dower for above two years. *Dobson v. Dobson*, Ca. temp. Harw. 19. 2 Barnard, K. B. 180. 207. 443. S. C. In that case, however, it is to be observed, the tenant did not plead *tout temp. priss*. And though he plead such plea, yet the widow shall recover damages from the teste of the original to the execution of the writ of entry. *Vide* cases *supr.* and Bull. Ni. Pr. 117.] Note; the Statute of Merton extends to copyholds, whereof the wife is dowable by custom. 4 Co. 30. Co. Lit. 33.

Co. Lit.
33. a.

If the heir or feoffee assign dower, and the wife accept thereof, she loseth her damages, because having the dower, which is the principal, she cannot sue for the damages, which are but consequential or accessory.

Co. Lit.
33. a.
Belsheld v.
Rous.
Moore, pl.
213. S. C.
Fendl. pl.
215. S. C.

In dower the tenant, as to part, pleads non-tenure, and to the residue, detainee of charters, and issue taken upon both pleas, and both found against the tenant; and it was found further, that the husband died seised such a day and year, leaving issue a son, which son, together with the demandant, as his mother and guardian, took the profits for six years after the husband's death, and that such a time the son died without issue, and the land descended to the tenant as uncle and heir to him, and that he entered

tered and took the profits till the purchase of the original writ; and the yearly value of the land was found, and damages were assessed for the detaining dower and costs; and the plaintiff had judgment for the damages from the death of the husband without any defalcation. In this case my Lord *Coke* says there are many things observable, but the most material seems to be the recovery of damages from the husband's death, though there was no demand of dower, and though the demandant herself took the profits for six years, which seems to be the consequence of the tenant's pleading non-tenure, which being found against him, the other matter found was superfluous, except as to the damages, for which he then remains deforced.

In dower upon default, a *grand cape* was awarded, and on suggesting that her husband died seised, a writ of inquiry of the value of the lands was awarded likewise, and inquisition taken and returned, and 60*l.* damages for the value of the land; and it was moved to stay the filing of the writ of inquiry, because no notice was given to the tenant thereof, nor of the execution of it; and though it was answered that in real actions no personal notice is to be given, but the tenant ought to take notice, because the summons is always executed on the land, and not elsewhere; yet *per curiam*, the *grand cape* is a judgment, and by that the suit is determined at common law, and the damages for the value of the land are added by the statute of *Merton*, and personal notice ought to be given of the writ, and of the execution of it, as in other cases of writs of inquiry; and therefore for want of notice they discharged the inquisition, and awarded restitution of the damages. But *Levinz* makes a *quære* of it, and says the practisers informed him that it is not usual to give notice of the executing of the writ of inquiry in case of dower.

will committed to another; the infant said his guardian would not let him assign dower; resolved *per tot. cur.* upon debate; 1st, That it was demandable of the heir, though he had been under age. 2dly, That his guardian was but in nature of a guardian in socage, and that the dower was not demandable of him; but of the heir, though not in the custody of the guardian; and that if the heir had entered upon the land to assign dower, he had been no trespasser upon the guardian, though the custody of the land during such nonage was committed to such guardian. 3dly, That his not assigning dower upon demand, though he did not refuse to do it, was a refusal in law, to entitle the plaintiff to her damages. *Hill. 29 & 30 Car. 2. in C. B. between Corfellis and Corfellis. Bull. Ni. Pri. 117.*

In dower, the tenant to part pleads non-tenure, and to other parts detainee of charters; and judgment for the demandant; but it was reversed in error, because the tenant, being within age, appeared by attorney, where it ought to be by guardian. Then a new writ of dower was brought, and the tenant pleads *tout temp prist*; the demandant pleads the first record to estop him; tenant rejoins *nul tiel record*, because it is reversed; which the court agreed; but they held that the demandant might take issue that he had not been *tout temp prist*, and give in evidence the first record to prove it.

dower, and occupied for five years, and then the tenant re-entered, and she brought dower; and agreed that in such case the tenant need not say *tout temp prist* generally, but shew the abatement and re-entry, for the time of her occupying shall be considered and recouped in damages.

3 Lev. 409. Perkins v. Lamb.

Upon a trial at bar the issue was, whether there was a demand of dower, and refusal, to entitle the plaintiff to damages? the plaintiff proved an actual demand of the heir, being of the age of 14 years, then in her custody, though by his father's

Dalison, 100. Rich's case. 3 Leon. 52. S. C. Note: The case in truth was, that after her husband's death she entered and abated without assignment of

Leon. 56.
Walker v.
Nevil.

In dower, judgment was given upon *nihil dicit*, and because the husband died seised, a writ of inquiry of damages was awarded; by which it was found that the third part of the value of the land was 8*l.* per ann. and that eight years had elapsed *a die mortis viri sui proxime ante inquisitionem*. & *assident damna* to 80*l.* and upon the record it appeared that after the judgment in the writ of dower the demandant had execution by *habere fa. seisinam*, and that damages were assessed for eight years; whereas it appeared upon all the records, that the demandant had been seised for part of the eight years; and therefore error was brought and assigned, 1*st*, That damages are assigned till the time of the inquisition taken, where they ought to be but to the time of the judgment; but this was disallowed. 2*dly*, That the value being found but 8*l.* per annum, the damages for eight years are but 64*l.*; but per cur., it may be that by the long detaining of dower demandant had sustained more damages than the bare value; but because it appeared that damages were assessed for the whole eight years, where the demandant herself was seised for part of them, by force of the judgment and execution, it was held erroneous.

Penrice v.
Penrice,
Barnes, 234.
(a) The
opinion of
the court in
this latter
point is con-
trary to the
preceding
case, and to
the express
words of the
statute of

[Upon the execution of a writ of inquiry in an action of dower *unde nihil habet*, the jury assessed damages to the amount of the third part of the value of the land, from the death of the husband to the day of the inquisition, without making any deduction for land-tax, repairs, or chief rents. The inquisition was set aside, the court being of opinion, that as there are in a writ of dower *unde nihil habet* the words *ultra reprimas*, a deduction ought to have been made for land-tax, repairs, and chief rents; and that the jury (a) ought only to have assessed damages to the day of awarding the writ of inquiry.]

Merton, c. 1., and also to the cases of Spiller v. Andrews, 3 Mod. 25. Dobson v. Dobson, Ca. temp. Hardw. 19. 2 Barnard. K. B. 180. 207. 443. and Kent v. Kent, 2 Barnard. 357.

Brook, 49.
73. 78. 93.

In dower if demandant recovers by confession, or otherwise, yet she may after, upon suggestion and averment, that her husband died seised, have a writ to inquire of the value and damages.

Brown v.
Smith, Hil.
25 & 26
Car. 2.
Bull. Ni.
Pri. 117.

[If the heir fell to *J. S.* and the widow recover her dower against him, he must pay the whole mesne profits from the death of the husband, though he have not himself been half the time in possession: she is entitled by the statute, and can recover only against the tenant.]

Lev. 58.
Aleworth
v. Roberts.
Sid. 188.
S. C. Keb.
85. S. C.
646. 711.
Brownl.
127. cont.

In dower *unde nihil habet*, the demandant had judgment, and a writ of seisin executed, and the tenant brought error, and the judgment affirmed; but pending this, the tenant aliens the land, and dies; and now the demandant brings *seire facias* against the heir of the heir, and against the alienee, to have her damages, suggesting that her husband died seised; the tenants severally plead the matters aforesaid; and judgment against the demandant; but therein agreed that the judgment is complete at common law without the damages, and error lies of it before the damages given, and that it is time enough to suggest the dying seised of the husband, in order to recover damages after the judgment given for

for the dower; but the statute of *Merton* gives damages *contra deforciores*, which here neither the heir of the heir, nor the alienee are; and therefore they are lost by the death of the heir, and are not a lien upon the land to pass with it; for if they should be recovered, from what time must this recovery be? not from the husband's death, because none of the present tenants had the land from that time; nor from the death of the heir, against whom the judgment was, for none of the now tenants are deforciores; and therefore they are like damages in trespass, which die with the party; and when the tenant dies before judgment for the damages, the judgment for the dower remains as at common law.

A widow brought a writ of dower, and recovered, and this judgment was affirmed in a writ of error, after which she took out a writ of inquiry of damages, but died before the same was executed; the damages are lost, being no duty till they are assessed; and therefore a *scire facias* by her administrator in this case was held not maintainable.

1 Show. 97. S. C. 3 Lev. 275. S. C.

[If the defendant plead *ne unque seife que dower*, the demandant may give in evidence a release to her husband, or a surrender to him by one who was seised as jointenant with him. So, if the demand be of an advowson or rent-charge, she may give a grant of the advowson or rent-charge in evidence, and that her husband died the day before payment or presentation.

for one jointenant cannot surrender to another, by reason of the unity of possession. Perk. § 586, 7. See 40 E. 3. pl. 21. 41. b. *contr.* See also Wetk. on Descents, 33. note.

If the tenant plead *ne unques accouple in loyal matrimonie*, it shall not be tried by a jury, but a writ shall issue to the bishop to certify it. To a demand of dower as the widow of *J. R.*, the defendants pleaded *ne unques accouple*; the plaintiff replied a sentence of the ecclesiastical court in a cause of divorce brought by Sir *W. W.* against her, charging that she was his wife, and had committed adultery with *J. R.*; to which she pleaded, that she was the lawful wife of *J. R.*, and not of the said Sir *W. W.*; and that afterwards *J. R.* died, and the cause coming on to be heard, the judge declared, that the plaintiff had been the wife, and was then the widow of *J. R.*; and she prayed judgment whether the defendants were not estopped to plead *ne unques accouple*. The court held it no estoppel, as the bishop's certificate in an action between the plaintiff and other defendants would have been.

In dower, the defendant pleaded, that *T. D.* was seised in fee, and made a lease to *J. C.*, but did not shew when seised in fee, or that the term was assigned to him; so it might be after coverture. After judgment for demandant, the said *J. C.* claiming by lease for years from *T. D.*, father of the demandant, prayed to be received, but the court would not admit him.

claiming under him, from giving a prior term in evidence on an ejectment afterwards brought by the widow under the judgment. Booth v. Marquis of Lindsey, 2 Ld. Raym. 1293.

By 16 and 17 Car. 2. c. 8. § 3, 4. execution shall not be stayed by writ of error upon any judgment after verdict, unless the plaintiff in error become bound to pay damages and costs, in case

3 Moi 281.
Mouant v.
Thorold.

Salk. 252.
pl. 1. S. C.
Carth. 133.
S. C.

2 Roll. Abr.
676. pl. 10.
Eoill. Ni.
Pri. 118.
But *qu.* as
to the sur-
render in
this case?

Robins v.
Cruchley,
2 Will. 118.
127.

Green v.
Roe, Com.
Rep. 581.
A recovery
in dower
will stop
the tenant,
and all

the judgment be affirmed, or the plaintiff discontinue, or be nonsuited; and the court wherein execution ought to be granted upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment; and upon the return thereof, judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

Kent v.
Kent,
2 Str. 971.
2 Barnard.
357. 386.
441. Ca.
temp.
Hardw. 50.

Where there are two tenants in dower, and one dies after judgment for damages, and his heir and the other bring error, the whole of the original damages shall be recovered against the survivor. But the value from the time of the judgment to the affirmation cannot be recovered against the surviving plaintiff only; nor can the court compute such damages after the rate of the damages found by the first jury, but they must award a writ of inquiry.

Doe v.
Roach,
Andr. 153.
Ca. temp.
Hardw. 573.

If the judgment be affirmed in *dem. proc.* and costs given, the defendant in error may bring an action upon the recognizance for such costs, without suing out a writ of inquiry.

(a) Wallis
v. Everard,
3 Ch. Rep.
87.
(b) Curtis
v. Curtis,
2 Br. Ch.
Rep. 634.
Mundy v.
Mundy,
4 Br. Ch.
Rep. 294.
and 2 Vez.
jun. 122.
Mitf. Eq.
Tr. 109.
(c) Williams
v. Lamb,
3 Br. Ch.
Rep. 264.
(d) Wake-
field v.
Childs, 8th
July 1791,
cited in
Fonbl. Eq.
Tr. 20.
(e) Mitf.
Eq. Tr. 111.

The writ of dower is now little in practice, and will probably in a short time fall quite into desuetude. The court of Chancery seems at length to be in possession of a concurrent jurisdiction with the common law courts in all cases of assignment of dower. That the court of Chancery had jurisdiction in matters of dower, for the purpose of assisting the widow to a discovery of the lands or title-deeds, or of removing any impediments to her rendering her legal title available at law, seems indeed never to have been doubted. But (a) it has been questioned, whether it could give relief in those cases, in which there appeared to be no obstacle to her legal remedy? However, the language of that court now is (b), "that the widow labours under so many disadvantages at law, from the embarrassments of trust terms, &c. that she is fully entitled to every assistance that a court of equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." And in the exercise of this jurisdiction it will enforce a discovery (c), even against a purchaser, for a valuable consideration without notice. And though (d) the widow should die before she had established her right at law, it will, in favour of her personal representative, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable. But courts of equity consider themselves as so far proceeding merely on a right which may be asserted at common law, that, as in a court of common law no costs can be given on a writ of dower, so no costs are given in a court of equity on a bill brought for the same purpose (e).]

(K) Of the Admeasurement of Dower.

F.N.B. 14S.
Co. Lit.
31. a.
2 Inst. 267.

IF the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at full age by the common law: so, if too much be

be assigned in dower by the heir within age, or his guardian in chivalry, and the heir die, his heir shall have such writ to rectify the assignment: but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir. If a disseisor assigns too much, the heir of the disseisee shall have admeasurement by the common law.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower, by the statute of *W. 2. c. 7.* before which statute the guardian had no remedy, because the writ of admeasurement, being a real action, lay not for the guardian, who had but a chattel: also, by the same statute it is provided, that if the guardian pursue such writ faintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the faint pleading or collusion generally.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of admeasurement lies: so if they be of greater value, by reason of mines open at the time of the assignment, no writ of admeasurement lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines, which were open at the time of such assignment.

If the sheriff assigns too much in dower, by one book it seems that the heir shall have a writ of admeasurement; but *q.* whether he shall have that or a *scire facias* upon the recovery, which was of no more than the third part? *pl. 13. Fitzh. Execution, 165. 2 Ld. Raym. 1274-5.*

These writs of admeasurement of dower are vicontiel, and not returnable; and the parties may plead before the sheriff in the county, if they think fit: but if they are removed in *C. B.*, by a *pone*, as the plaintiff may, without shewing any cause, and the defendant, upon shewing cause; and thereupon process goes out, *viz.* fummons, attachment, and *distingas*; then the sheriff cannot make admeasurement, but ought to extend all the lands particularly, and return it in *C. B.*, and upon that admeasurement shall be made.

Dower by the Custom.

This kind of dower varies according to the custom and usage of the place, and is to be governed accordingly; and where such custom prevails, the wife cannot waive the provision thereby made for her, and claim her thirds at common law, because all customs are equally ancient with the common law itself.

By the custom of gavelkind in *Kent*, the wife shall have the moiety so long as she keeps herself chaste and unmarried. The reason of this provision for the wife seems to be founded on the equal distribution, which is observed in this kind of inheritance in the same family for their equal support; and therefore when she proves unchaste, or marries again, and thereby contracts a new alliance,

2 Inst. 367.

F.N.B. 149.
2 Inst. 363.

5 Co. 12.
Saunders's case.

Palm. 265.
[Br. tit.
Dower, pl.
83. Extent,
1274-5.]

F.N.B. 143.

Co. Lit.
33. b.
Cro. Eliz.
825.
Leon. 62.
133.

Co. Lit. 33.
b. 111. a.
F.N.B. 140.
Stanf. Præf.
41. b.
Roll. Abr.
552.
Bro. k. tit.

Dower, 70. alliance, this provision as to her ceases, and returns again into the family. But the presumption of her chastity is to continue till it be proved she was delivered of a child, begotten during her widowhood, which may be in any action brought by or against her.

Brook, tit. Custom, 67.
69. 72.
2 Jon. 6.
Sid. 136.
Lambart's perambulation, 555. [But authorities are not wanting to shew, that not only child-bearing, a casual consequence of fornication, and the detection of it in this publick manner, but the commission of the act of fornication itself is a forfeiture of her estate. Rob. Gavellk. 165. and the authorities there cit. ed.]

Hunt & Uxor v. Gilburn, Leon. 62. Cro. Eliz. 121. S. C. 21 Judged. Moor, 260. pl. 408. S. C. 21 Judged. Cro. Eliz. 825. S. P. and S. C. cited.

Dower, and demands the third part of the lands of *A.* her late husband lying in *Kent, &c.*, defendant pleads that the custom there is, that wives shall have the moiety of their husbands' lands in dower, so long as they live chaste and unmarried, and *non aliter*, or *non secundum cursum communis legis*, and that the demandant after the death of her first husband had married the other demandant, &c.; *et per cur.*, the custom is good, and is the law in *Kent*; and therefore she can claim no other dower, nor in any other manner, and the rather, by reason of the negative conclusion.

Co. Lit. 33. b. 110. b. F. N. B. 150. Cro. Eliz. 415. Moor, pl. 566.

By the custom of borough-english, the widow shall have the whole of her husband's lands in dower, which is called her free-bench.

The reason of which seems to be, that in these boroughs the eldest son was introduced into the trade of his father, and therefore the youngest son inherited the land, and consequently the wife that was intrusted with the younger children or her husband had the whole during her life.

Cro. Jac. 126. Lashmer v. Avery.

Upon a special verdict, the case was this: a custom of a manor was found to be, that if a copyholder in fee died seised, his wife should hold it during her life as *frank bench*; the lord enfeoffs the copyholder, who died seised; and adjudged that her customary estate was gone, because by the accession of the freehold the copyhold estate was extinguished, and so her husband did not die seised thereof; *scilicet*, if the lord had enfeoffed a stranger, for then the copyhold remained so still, and the custom with it.

Hob. 181. Howard v. Bartlett. Cro. Jac. 575. S. C.

Custom of a manor was, that the wives of copyholders for life should enjoy their husbands' estates during widowhood; and the case was, that *A.*, a copyholder for life, purchased the freehold and inheritance of his copyhold, but took the conveyance to *B.*, and his heirs during the life of *A.*, remainder to *A.* in fee, and then *A.* dies: adjudged that his wife should have her customary estate, because the customary estate of *A.* her husband continued during his life, and was not extinct, nor altered by the purchase of the freehold, which during his life was in *B.*, and then all customary incidents to such customary estate remain, whereof this is one, and grows out of it as an excrescence or fruit, and she may enter without admittance.

3 Lev. 385. Benfon v. Scott. 4 Mod. 251. S. C. Sa k. 185. pl. 3. S. C. Carth. 275. S. C.

Custom of a manor was, that the copyholders' wives should have their free-bench of all copyholds whereof their husbands died seised; and a copyholder, being married, surrenders to *A.* in fee by way of mortgage, for securing 70*l.* and this surrender was presented to be enrolled; but before admittance the surrenderer dies, and after his death *A.* is admitted; and if the wife should have

have her free-bench, was the question? For the wife it was said, that till admittance the copyhold remained in the husband, and then he died seised, and so his wife within the custom; and though the admittance after his death has relation to the time of the surrender, yet that is only by fiction of law between the parties, but shall not prejudice the wife who is a stranger: also, the admittance hath relation to the marriage, which was before, and is perfected by, the death of the husband, and so her title was begun and perfected too, before the title of the surrenderee. But the court denied that the wife had any initiate title by the marriage in this case as women have to their dower at common law; but she hath only a conditional inception of a title subject to the husband's power of preventing it by alienation, as here he might have done; for she is not to have her free-bench but where the husband died seised; and this by the relation of the surrender he did not; and adjudged accordingly.

[The custom of a manor was to grant copyholds for three lives: the first life had a power of surrendering the whole estate, and the widow of a tenant, who died seised, was entitled to her free-bench. *F.*, a copyholder for three lives, surrendered to *H.*, the deceased husband of the defendant; who afterwards by licence from the lord, demised to *J. S.* for ninety-nine years by way of mortgage: then *H.* died, and *J. S.* assigned to the plaintiff. At the trial, only one instance of a lease by licence was given in evidence; whereupon it was insisted for the defendant, the widow, that there being no special custom to let by lease, the only way of transferring the copyhold was by surrender. And therefore in this case, if the estate of *H.* the husband was not determined according to the custom of the manor, he must be deemed to have died seised of the copyhold, and the widow still entitled to her free-bench. But the court said, that here, the right of the husband was confined to such estate as he should *die seised of*; consequently, as between lord and tenant, they might defeat the wife's estate when they pleased.]

The custom of a manor was, that the wife of a copyholder dying seised should have her widow's estate; a commission of bankruptcy is taken out against the copyholder, and his estate sold by the commissioners, but before the vendee was admitted the copyholder dies; and yet adjudged that the widow's estate was gone, because her husband did not die seised, his estate and right being bound by the sale, to which the admittance after has relation, and divests the widow's estate.

If the custom of a manor be, that if any of the tenants marry a widow she shall have no dower; this is good; but custom, that the wife of tenant in fee shall not be endowed, is not good.

If there be a custom, that where the husband sells his lands and his wife receives part of the money, or if it be expended in the family, that his wife shall be barred of her dower, this may be good.

Ancient rent, or common in borough-english, gavelkind, &c. is of the nature of the land there, and women shall have dower accordingly;

Skin. 406.
Pl. 1.
12 Mod. 49.

Salisbury
v. Hurd,
Cowp. 481.
Farley's
case, Cro.
Ja. 36. S.P.
Anon.
Freem. 516.
S. P.

Cro. Car.
569.
Parker v.
Ellen.

Roll. Abr.
562.
Dav. 30. b.

Roll. Abr.
562. Brook,
tit. Custom,
53. 75.

Brook, tit.
Custom, 4.
58. 65. 63.

accordingly; and so it seems to be of rent, common, &c. newly granted, though some have held the contrary; and in all these cases, whether it be of land or rent, the custom must be shewn specially.

Perk. 435,
436.
2 Sid. 139.

If the custom be, that the wife shall have for her dower the moiety of the lands and tenements of her husband, &c. she shall not be endowed of a fair or bailiwick, because the custom shall be taken strictly, and these are no tenements: *secus*, if they were appendant to a manor, whereof she is dowable, for then she shall have a moiety of the profits as appendant to a moiety of the manor.

Dower *ad Oſtium Eccleſiæ*.

Lit. § 39.
Co. Lit. 34.
a. 36. b.
37. a.
(a) Cannot
be made by
one under
age. Perk.
438.
(b) Dow-
erment *ad*
oſtium ca-

Dower *ad oſtium eccleſiæ* is where a man of full (a) age, ſeiſed of lands in fee, after marriage endows his wife at the (b) church-door of (c) a moiety, a third or other part of his lands, declaring them in certainty; in which caſe, after her husband's death, ſhe may enter into ſuch (d) lands without any other aſſignment, becauſe the (e) ſolemn aſſignment at the church-door is equivalent to the aſſignment *in pais* by metes and bonds: but this aſſignment cannot be made before marriage, becauſe before, ſhe is not entitled to dower.

meræ caſtri vel meſſuagii is not good. F. N. B. 150. Co. Lit. 34. (c) It was formerly held that it could not be of more than a third part of the husband's eſtate. F. N. B. 150. Co. Lit. 34. b. 36. a. (d) This dower cannot be of the capital barony held of the king *in capite*, or of the capital meſſuage held by knight's ſervice. (e) This dower, before the ſtatute of frauds and perjuries, was held to be good without deed, or without livery and ſeiſin. Perk. 437. Brook, 7. 80. Dyer, 18. pl. 108. Co. Lit. 34. a. 35. a.

Co. Lit.
32. a.

If this dower be aſſigned, with a claufe, that, notwithstanding any divorce that ſhall happen, the wife ſhall hold it for her life, this is good, becauſe *modus & conventio vincunt legem*.

Co. Lit. 38.

If tenant in tail aſſigns ſuch dower, this ſhall not bind his iſſue againſt the ſtatute *de donis*, nor him in the reversion after the eſtate ended.

Dower *ex Affenſu Patris*.

Lit. § 40.
Co. Lit.
35. 36.
Perk. 444.
Brook, 7.
80. Plow.
304. b.
Cro. Jac.
169. Dower
ex affenſu
patris is

Dower *ex affenſu patris* is where the father is ſeiſed of lands in fee, and his ſon and heir (f) apparent after marriage endows his wife by the father's aſſent, *ad oſtium eccleſiæ*, of a certain quantity of them; in which caſe, after the death of the ſon, his wife may enter into ſuch parcel, without any other aſſignment, though the father be living: but this aſſent of the father muſt be by deed, becauſe his eſtate is to be charged *in futuro*, and this may like- wiſe be of more than a third part.

as good. Perk. 441. Co. Lit. 35. This endowment of a reversion expectant on an eſtate for life is not good, nor of lands held by the father in jointenancy, becauſe not dowerable of them. Co. Lit. 35. a. Perk. 445. F. N. B. 150. (f) Can be only by the heir apparent. Perk. 442. F. N. B. 150. 3 Co. 38. 6 Co. 22. Co. Lit. 35. But it is good, though the heir apparent be within age, for the eſtate does not move from him. Co. Lit. 35. b. 38. a. Brook, 80.

4 Co. 1.
Co. Lit. 36.
Brook, 97.

Theſe dowers, *ad oſtium eccleſiæ*, or *ex affenſu patris*, if the wife enters and aſſents to them, are a good bar of her dower at com-
mon

mon law; but she may, if she will, waive them, and claim her dower at common law, because being made after the marriage she is not bound by them. 3 Leon. 272.

These dowers ensue the nature of dower at common law, and the wife may have a writ of dower for them, though they are certain, as well as for her dower at common law, and as well against the guardian as the tertenant. Co. Lit. 35.
F. N. B.
150.

These dowers are good, though the wife be under the age of nine years at the time of her husband's death, being made by consent. Co. Lit. 30.
a. 37. a.

But they are forfeited for high or petit treason in the husband; and so they were anciently, if he were attainted of felony or murder; though now in these last cases they are saved by the statutes 1 E. 6. c. 2. and 5 Edw. 6. c. 11., but remain forfeitable by his attainder of high or petit treason. Co. Lit. 37.
a. 41.
Stanh.
195. a.

Dower *de la plus Beale*.

Dower *de la plus beale* is where there is a guardian in chivalry, and the wife occupies lands of the heir as guardian in socage, if the wife brings a writ of dower against such guardian in chivalry, he may shew this matter, and pray that the wife may be endowed *de la plus beale* of the tenements in socage; and it will be adjudged accordingly. And the reason of this endowment was to prevent the dismembring of the lands holden in chivalry, which are *pro bono publico*, and for the defence of the realm. Lit. § 42.
Co. Lit. 38.
39. a. b.

After judgment given, the wife may take her neighbours, and in their presence endow herself of the fairest part of the tenements, which she hath in socage, for her life. Lit. § 43.

If the lands, which the wife hath as guardian in socage, are not of value sufficient for her dower, or if a rent-charge be issuing out of them, upon her shewing thereof, she shall recover of the guardian in chivalry to make it up. Lit. § 43.

If all the lands which the husband had were holden in socage, and his wife hath them as guardian in socage, she shall be allowed the third part of the profits upon her account in allowance of dower. But she cannot endow herself of the third part thereof, because that would be to make herself judge in her own cause; neither can the heir, in a writ of dower brought against him, plead that he is guardian in socage, and may endow herself. Park. 451.

Guardian by tort in socage cannot endow herself *de la plus beale*, because the law will not encourage such wrong and violence. 5 Co. 30.

Durefs.

EVERY legal contract must be the act of the understanding, which they are incapable of using, who are under restraints and terrors; and therefore the law requires the free assent of the parties as essential to every contract, and that they be not under any force or violence. But for the better understanding hereof I shall consider:—

- (A) For what Durefs or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.
 - (B) On whom and by whom the Durefs must be committed.
 - (C) What Contracts or Securities may be thus avoided.
 - (D) The Manner of avoiding them.
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- (A) For what Durefs or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.

Co. Lit. 253. Jenk. 166. **I**T seems clearly agreed, that where a person is illegally restrained of his liberty by being confined in a common gaol, or (a) elsewhere, and during such restraint enters into a bond, or other security, to the person who causes the restraint, that he may avoid the same for durefs of imprisonment. 2 Inst. 482.

2 Inst. 481. But if a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment: for this is not by durefs of imprisonment, because he was in prison by (b) course of law; for it is not accounted in law durefs of imprisonment, but where either the imprisonment, or the durefs that is offered (c) in prison, or at large, is tortious and unlawful; for *executio juris non habet injuriam*.

3 Leon. 239. per cur. (c) If a man be lawfully in prison, yet if he makes an obligation against his agreement and will, he may avoid it by durefs. 43 E. 3. 10. b. Roll. Abr. 687. Where after judgment the defendant, having no good cause of action, caused the plaintiff to be arrested and detained in prison, threatening him that if he would not seal a release to him, he should lie there

there and rot; and thereupon he sealed one, and was discharged; it was ruled at Guildhall by Bridgman, C. J. that this release could not be avoided by durefs, because he was in custody in the course of law by the king's writ when he sealed, but he offered it should be found specially if Baldwin would pray it, which he did not; and therefore the release was held good. Lev. 69.

My Lord Coke says, that for menaces, in four instances, a man may avoid his own act. *1st*, For fear of loss of life. *2dly*, (a) Of loss of member. *3dly*, Of mayhem. *4thly*, Of imprisonment. 2 Inst. 483. (a) 2 Roll. Abr. 124. S. P.

But menacing to commit a battery, or to burn his houses, or spoil his goods, is not sufficient to avoid the act; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him. 2 Inst. 483.

If a man is taken by virtue of a process issuing out of a court that hath no power to grant such process, and for his enlargement gives bond to appear in the said court, this may be avoided, because taken by durefs: adjudged in an action upon such bond, given by one who was taken upon an attachment under the privy seal of the court of request; for that court had (b) no power to grant such process, and therefore it was no warrant to the sheriff to take his body. Cro. Eliz. 646. Stepney and Lloyd. 4 Inst. 97. S. C. Cro. Car. 596. (b) So, where the arrest was by the pursuivant of the high commission by their command, until he entered into a bond to appear, &c. it was held void. Roll. Abr. 687.

If A. falsely charges B. with felony for stealing his horse, and procures a warrant from a justice of peace to a constable, whereby he is taken, and being in custody, upon A.'s promise to discharge him, seals a bond for 10*l.* to A., and is thereupon immediately discharged; this bond may be avoided by durefs; and so ruled, it appearing that the horse was B.'s own horse, and that these proceedings were only to cover the deceit. Allen, 92. Ruled by Roll accordingly upon the trial of an issue on the durefs.

Also in equity, if a man by compulsion enters into a bond, though the terror and force are not sufficient to make it durefs at common law, yet it may be relieved against. 2 Vern. 497. per Car.

But in this every case must depend on its own circumstances; for where A. being taken by the husband going to bed to his wife, gave securities for payment of 500*l.* and a bill was brought to be relieved against the securities, suggesting a plot to catch him; and that the defendant with an axe threatened to cut him in pieces; there being no proof of a plot, and it appearing that the securities were entered into at three several times, and when the plaintiff was in cool blood, and that he joined in concealing the consideration thereof, the court refused to relieve. Preced. Chan. 266. Woodman and Skute.

Also, by a rule of the court of Common Pleas, 14 & 15 Car. 2. 1662. all warrants for confessing judgments, taken by any sheriff or bailiff from any person in his or their (c) custody by arrest, if not executed in the (d) presence of some sworn attorney of (e) either court, and his name set or subscribed thereto as a witness, shall not be (f) good, or of any force; and upon oath made that this was not done, the same shall be set aside, and the sheriff or officer may be punished for so doing; and if judgment be entered thereon, the same on motion will be vacated and set aside; and if the [The same rule obtains in B. R. See tit. Attorney, vol. 1. 293.] (c) So, if a man under arrest be seemingly discharged by the bai-

lifts with a design that he should the execution thereon be executed, the party will have restitution awarded him.

give a warrant of attorney to confess a judgment, but if he did not, to be retaken; this is within the rule. 6 Mod. 85. So, if he be really discharged; yet if he has probable reason to believe himself not to be discharged, and under such apprehensions, he gives a warrant for confessing of judgment, it will be set aside. 6 Mod. 85. agreed *per cur.* (d) Though an attorney be present, yet if there be practice in obtaining it, it will be set aside. 6 Mod. 85. — So, where an administratrix owed money to *A.*, in right of her intestate only, and was arrested by *A.* without naming her administratrix, and gave a warrant of attorney to confess judgment, whilst under an arrest; though judgment was entered, and her goods taken in execution, and although an attorney was present, yet the court set aside the judgment for irregularity; and awarded restitution. 6 Mod. 163. (e) If one under an arrest confesses judgment in *B. R.* in the presence of a sworn attorney of *C. B.* it is well. *Wilmot v. Barry*, Barnes, 44. Str. 530. and so *vice versa*. 6 Mod. 85. 1 Salk. 402. Comb. 224. If one under an arrest by process of an inferior court gives warrant for confessing a judgment in that court, it will not be set aside in *B. R.* though no attorney be present. 6 Mod. 85. — But if being in custody by process of an inferior court he gives a warrant of attorney to confess judgment in *B. R.* if an attorney be not present, it will be set aside. 6 Mod. 85. (f) But if the defendant is arrested, and in execution, and one becomes bound for him to the plaintiff, and the defendant gives him judgment for his counter-security, it is good, though no attorney were present. 5 Mod. 144. One in execution may confess a new judgment, without the presence of an attorney. 2 Stra. 1245. [But even in that case, if the party had been prevailed upon to confess a judgment for more than was really due, the court would relieve. Cowp. 281.]

(B) On whom and by whom the Durefs must be committed.

Roll. Abr. 687. Mon-
tal and
Wooling-
ton, Brownl.
66. S. C.
adjudged.
THE durefs that will avoid a deed must be done to the party himself; therefore if *A.* and *B.* enter into an obligation, by reason of durefs done to *A. B.* (a) shall not avoid this obligation, though *A.* may, because he shall not avoid it by durefs (b) to a stranger.

[*Wayne v. Sands*, Freem. 351. acc.] (a) Cro. Jac. 187. S. P. adjudged, and that the bond may stand good as to one, and be avoided as to the other *. (b) Durefs by a stranger, by procurement of the party that shall have the benefit, is a good cause to avoid, &c. 43 E. 3. 6. Roll. Abr. 688. S. C. — But durefs by a stranger, without making the obligee party thereto, is no cause to avoid, &c. Keilw. 154. a. — * But suppose such bond joint, and not several, will not the durefs of one obligor avoid it, as to the other?

(c) Roll. Abr. 687. But (c) a son shall avoid his deed by durefs to his father; so (d) shall the father his deed, by reason of durefs to his son.
(d) 2 Brownl. 276. [But *per Twissden, J.* a man shall in no case avoid his deed by a durefs to another, let him be related how he will. Freem. 351.]

Roll. Abr. 687. Also the husband shall avoid a deed made by durefs to his wife.
2 Brownl. 267. S. P. For the husband and wife are but one person. Sid. 123. cited to be adjudged. — For durefs of imprisonment of the plaintiff's commoign. Keilw. 154.

Roll. Abr. 687. But a servant shall not avoid a deed made by durefs to his master, nor *vice versa*.
2 Brownl. 276.

(C) What Contracts or Securities may be thus avoided.

IF a man makes a (a) lease by durefs, and the lessee enters, the lessor shall have an assise against him as a disseisor; for the free consent of parties being essential to all contracts, where either of the parties is under force and violence, his free assent cannot be supposed, and therefore such contract is void, and the person who enters by virtue of it is a wrong-doer.

Bro. tit. Disseisin, 63.
(a) So, if a man under durefs makes a letter of attorney to give livery, he shall have an assise. Bro. tit. Disseisin, 63.

But if a man by durefs make a feoffment and livery in person, he shall have no assise against the feoffee, because such durefs shall not be presumed, for then the power of the *pair*, present at the solemnity, would have been supposed to have come in to his rescue.

Bro. tit. Disseisin, 63.
Vide 2 Inst. 483., where it is said that a feoffment made by durefs is not void, but voidable only.

So, if a man acknowledges and enrolls a deed, he cannot afterwards plead durefs.

Moor, 42.
Cro. Eliz. 88. S. C.

And the court inclined accordingly. Roll. Abr. 862. S. P. And that no averment shall be taken, that a deed enrolled was made by durefs.

But a statute merchant may be avoided by *audita querela*, because it was made by durefs of imprisonment.

Roll. Abr. 687. Owen, 142. S. C. Vide Vidian Ent. 107.

In debt, for the arrears of an account, the defendant may shew that the plaintiff of his own wrong imprisoned the defendant, and assigned auditors to him, being in prison, and that for the account was by durefs.

Leon. 13. The Earl of Northumberland's case adjudged by all the judges.

A will shall be (b) avoided by durefs or menace of imprisonment.

Dyer, 143. b. (b) So, if a man makes

a will in his sickness by the over importunity of his wife, to the end he may be quiet, this shall be said to be a will made by restraint, and shall not be good. Styl. 427.

If a man takes *A. S.* to wife by durefs, though the marriage be solemnized *in facie ecclesie*, yet it is merely void, and they are not husband and wife, for without a free consent (c) there can be no marriage.

Keilw. 52. b. 1 N. Dyer, 13. in margin. Sid. 65.

(c) Though *de jure* it cannot, yet *de facto* it may, and so within the Statute 3 H. 7. c. 2. Cro. Car. 488.

(D) The Manner of avoiding them.

IF a man executes a deed by durefs, he cannot plead *non est factum*, for it is his deed, though he may avoid it by special pleading judgment *si actio*.

5 Co. 119. Resolved per Cur. 2 Inst. 483.

S. P. Vide Keb. 516. That in pleading, the special manner of the durefs, viz. whether it was *per vias vias*, *minas imprisonment*, &c. must be set forth; and note, so are all the entries.

Ejectment.

(A) Of the Nature of the Action, and Antient Manner of Proceeding in Ejectment.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.
2. Of adding proper Parties.
3. Of the Costs.

(C) In what Case the Antient Form is still to be adhered to.

(D) Of the Declaration in Ejectment: And herein,

1. Of what Things an Ejectment will lie.
2. What shall be a sufficient Description thereof.
3. Of the Devise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster,

(E) Of the Plea and General Issue in Ejectment.

(F) Of the Verdict and Judgment in Ejectment.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be sued.
2. How the Writ is to be executed.
3. How the Plaintiff is to be quieted, and what Relief he has where his Possession is disturbed.

(H) Of the Mesne Profits, and how to be recovered,

(I) Of bringing a new or second Ejectment.

(A) Of the Nature of the Action, and Antient Manner of Proceeding in Ejectment.

AN ejectment is a mixed (a) action, in which a lessee for years, when ousted, shall recover his term, as also his damages.

5 Co. 105.
9 Co. 77.
(a) For it is real in respect of the lands, and personal in respect of the damages and costs. Comb. 250.

[It is also a *possessory* action, grounded on a *right* to the possession of the premises in question between the parties. It is always necessary therefore for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute.]

This remedy was contrived to supply several defects which attended the bringing of real actions; for in these the party could not recover any damages, neither could he regularly bring a second action if he was barred in the first.

But the concluding the demandant by one action being oftentimes found to have been very prejudicial to his right; to supply this and several other inconveniencies which attended the bringing of real actions, the manner of forming a term for years, and the lessee's bringing an ejectment to recover the term, thereby to assert the title of the lessor of the plaintiff, was found out, and was (b) first introduced in the 14 H. 7. (c), before which time it seems that leases for years were but of very short duration, and were generally defeated or determined before any intricate title could be decided, and were such precarious possessions with respect to the power which the owner of the freehold and inheritance had over them, that every such lessee was looked upon only as his bailiff; and if ousted, could only have recovered damages for the loss of his possession; and if ousted by his lessor, he could only seek a remedy from his covenants.

(b) F. N. B. 220.
[(c) This method appears to have been settled as early as the reign of Edw. 4. In 7 E. 4. 6. per Fairfax, *si homo per ejedione firmæ, le plaintiff recovers son terme qui est arreç si bien come en quare jact* *infra terminum; et, si nul s'it arreç, donques tout in damages.* Bro Abr. 1. *Quare ejecit infra terminum*, p. 6.]

It seems also, that some time before the above-mentioned period, long terms had their beginning, which to secure to themselves, the lessees used, when molested, to go into equity against the lessors for a specifick performance, and against strangers, to have perpetual injunctions to quiet their possessions. This drawing the business into the courts of equity, was probably one reason which obliged the courts of law to come to a resolution, that they should recover the land itself in an *habere facias possessionem*. Hence this action became, and still continues, the common method of controverting the title to lands and tenements.

As this resolution brought on a new method of trial unknown before to the common law, it became usual for a man that had a right of entry into any lands to seal leases of ejectment on the lands, and then any person that next entered on the freehold was an ejector (d). But as this was a means of turning any man out

(d) The practice or setting up a casual ejector is laid by Keeling to have been

introduced
about the
time of the
troubles,
1 Keb. 705.
but in truth
it is of much
earlier date.
3 Burr.
1297.]

F. N. B.
489.

of possession, because the lessee would recover his term without any notice to the tenant in possession, the courts of justice would not suffer that men should lose their possessions without any opportunity to defend them; they therefore made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without delivering the tenant in possession a declaration, and making him an ejector and proper defendant if he pleased.

This was a proper rule; for otherwise the court would be made instrumental in doing an injury to a third person, because a declaration might be delivered to a stranger, a feint defence be made, and a verdict, judgment, and execution obtained without the tenant's having any notice of it. For, though it is not to be doubted, but that such actions were brought at first against the real ejectors that resided in the possessions; yet because any person that came into the land *animo possidendi*, was equally an ejector with him that resided, and the action in strictness of law might be brought against him, which might turn to the injury of the residing possessor; therefore the courts declared that they would not give judgment unless the tenant in possession had notice of it, and an affidavit was made that he was served with a copy of the declaration.

Style, 468.
T. Raym.
93. Keb.
795. 740.

Upon such notice to the tenant in possession, and affidavit as aforesaid, the tenant in possession used to move the court, that as the title of the land belonged to him, he might defend in the casual ejector's name, which motion the court, upon an affidavit of that matter, would grant, and direct that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless. But the casual ejector was not permitted to release errors in prejudice of the tenant in possession, though the suit was carried on in his name by rule of court, and the process for costs was taken out against him; and he was obliged to put the bond of the tenant in possession in suit, who undertook to save him harmless.

Also, by the ancient practice, such leases were actually to be sealed and delivered, because otherwise the plaintiff could maintain no title to the term: they were to be sealed too on the land itself, because it was maintenance to convey out of possession.

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.

[(a) which
is the first
process.
Ree v. Dee,
1 Anst.
173.]

According to the modern practice there is regularly no necessity of sealing and delivering leases on the lands; but the party who claims a title feigns a lease, and in the name of the feigned lessee delivers a (a) declaration to the tenant in possession in

in the name of the casual ejector, who is also now some feigned person; on which declaration there is (a) notice to the tenant in possession in the casual ejector's name. (a) Which notice is, that as the casual ejector does not claim title, unless the tenant appears and defends his title, the casual ejector will suffer judgment to pass by default, whereby the tenant will be turned out of possession. [It must be signed by the casual ejector. *Barnard, K. B. 43*, or by the nominal plaintiff. *3 Term Rep. 351*.]

It hath been holden, that the service of the declaration ought to be on the tenant himself, or his wife, and that the service on any of his children or (b) servants is not good; and now by the 4 Geo. 2. c. 28. it is enacted, "That in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place or stead of a demand and re-entry," &c.

though it should not clearly appear that the declaration came to the hands of the tenant before the effoign day of the term. *1 H. Bl. 644. Barnes, 183*. The service, if made personally on the tenant himself, need not be on the premises. *2 Str. 1004*. But if the tenant abscond, or keep out of the way, to avoid being served, it is usual to serve a declaration on some person residing at his house, or if that cannot be done, to affix the same upon the door; and then, on an affidavit of the circumstances, to move the court for a rule upon the tenant, to shew cause why such service should not be deemed sufficient: the court will prescribe the mode of serving the rule, which is generally made absolute on an affidavit of its service. *Sprightly v. Dunch, 2 Burr. 1116. Goodright v. Noright, 1 Bl. Rep. 290. Fenn v. Denn, 2 Burr. 1181. Gulliver v. Wagstaff, 1 Bl. Rep. 517*.]

After the declaration delivered, the plaintiff's attorney (except as is above excepted by the statute) is obliged to make oath that he delivered to *J. D.* tenant in possession of the premises in question, a true copy of the annexed declaration, with the before-mentioned subscription, which subscription the deponent did then read to the said *J. D.* and acquaint him with the contents thereof.

This affidavit is to be positive, that *J. D.* was tenant in possession, or that the defendant acknowledged himself to be so, because no man should be turned out of possession without a positive affidavit, on which he may charge the defendant with perjury.

nant, or C. his wife; or the wives of *A.* and *B.* who or one of them are tenants: neither sufficient. *Barnes, 173, 174*.—The affidavit required, where the declaration is served in pursuance of 4 Geo. 2. c. 28. is, in substance, as follows: "That the declaration was fixed on such a place, being the most notorious part of the premises in question (there being no person in possession, on whom the declaration could be legally served): that half a year's rent was then due from the tenant: that no sufficient distress was to be found on the premises to answer the arrears then due: that the late tenant held such premises by virtue of a lease from the lessor of the plaintiff; and that therein is contained a clause of re-entry for non-payment of that rent." *Caf. Pr. C. P. 68*.]

Upon

(a) Salk.

259. pl. 14.

Upon this affidavit the plaintiff moves for judgment against the casual ejector, which is always granted, unless the defendant in due time enters into the common rule of confessing lease, entry, and ouster. This rule being made by assent of parties, an attachment lies for non-performance of it, as for all other rules of court that are disobeyed; and this is all (a) the remedy which the parties on both sides have for their costs.

If there be several persons that claim title, the rule may be drawn generally or particularly: generally, as that *J. H.* who claims title to the premises in question in his possession should be admitted defendant for such messuages; and this puts a necessity on the plaintiff at the assises to distinguish by proof what tenements are in each defendant's possession, because by the rule he is to confess lease, entry, and ouster, only for the lands in his possession; and if the plaintiff cannot distinguish by proof what tenements are in each defendant's possession, he can have no verdict against him, and consequently no judgment.

Or the rule may be drawn specially, that *J. H.* who claims title to such lands, expressing them particularly, should be admitted defendant, and that supercedes the necessity of proof, that the lands are in his possession; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may summon him before a judge, who will order the rule thus specially to be drawn up, in case the party in possession will admit himself to be defendant.

Running-
ton's Eject.
165.

[In the King's Bench, if the premises are situate in *London* or *Middlesex*, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the plaintiff should regularly move for judgment against the casual ejector, in the beginning of the term; and then the tenant must appear within four days inclusive after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; though if the motion be not made before the last four days of the term, the tenant need not appear until two days before the effoign day of the subsequent term. And should the notice in such case require the tenant to appear in the next term generally, the tenant has the whole of that term to appear in.

Reg. Tr.
32. Car. 2.
C. B.

In the Common Pleas, if the premises are situate in *London* or *Middlesex*, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector, for default of appearance, unless such motion be made within *one week* next after the first day of every *Michaelmas* and *Easter* terms, and within four days next after the first of every *Hilary* and *Trinity* terms. But it has been holden, that this rule does not extend to the case of a vacant possession under 4 *Geo. 2. c. 28*.

Barnes, 172.

In country causes, though the declaration be delivered before the effoign day of *Easter* or *Michaelmas* term, yet the tenant, in both

both courts, is allowed till four days after the next issuable (that is, *Hilary* or *Trinity*) term to appear, and if the cause arise in *Cumberland*, or in any other county where the assises are holden only once a year, the tenant is not compellable to appear till four days after the term preceding the assises. But in the King's Bench, the plaintiff must move for judgment the same term in which the tenant has notice to appear; though the practice is different in the Common Pleas, for there he may move for judgment at any time during the next issuable term. By a late rule of the court of King's Bench, the clerk of the rules is, for the future, to keep a book, in which are to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry is to specify the number of the entry; the county in which the premises lie; the name of the nominal plaintiff; the *first* lessor of the plaintiff, with the words "*and others*," if more than one; and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment shall be moved, no rule is to be drawn up, or entered, nor any proceeding had in such ejectment.]

1 Salk. 257.

M. 31 Geo.
4. 4 Term
Rep. 1.

If on the trial the defendant will not appear and confess lease, entry, and ouster, the course is to call the defendant and his attorney, if he be within the rule, and then to call the plaintiff himself and nonsuit him, and then, upon the (a) return of the *posse*, (b) judgment will be given against the casual ejector.

(a) But the judgment against the casual ejector cannot be entered till the

posse be returned, on which is indorsed, that the nonsuit was for want of confessing lease, entry, and ouster; for it does not appear that the defendant has not complied with the rule till after the assises at which the cause was to have been tried, and therefore the judgment cannot be entered till the next term after such assises. [And such is the practice of the court of King's Bench. Doc. on the dem. of Lord Palmerston v. Copeland, 2 Term Rep. 779. But in the court of Common Pleas, the plaintiff may, in this case, enter up judgment against the casual ejector, and take out execution, *immediately* after trial. Throgmorton on the dem. of Fairfax v. Bentley, C. P. Hil. 27 Geo. 3. *Ibid.*] (b) Of which judgment the defendant cannot bring a writ of error, for he was no party thereto; and if he brings such writ in the name of the casual ejector, the casual ejector being a friend to the plaintiff's lessor, may either release the errors, or upon a motion for a *non pros.* the court will order it to be entered.——But if an infant be tenant in possession, and the plaintiff obtain judgment against the casual ejector for want of confession of lease, entry, and ouster, and the infant bring a writ of error in the casual ejector's name; and the defendant in error set up a release from a casual ejector; upon making this out to be the case of the infant, on motion on the writ of error, the court will not suffer such a release to be pleaded in bar to such writ of error, because no laches can be imputed to the infant for want of confession of lease, entry, and ouster. See *infra* n.

If the plaintiff in ejectment, who is but a nominal person, dies, yet the action shall not abate; for if there be any other person of the same name, the court will intend him to be the person mentioned in the declaration, because he is only nominal, and therefore while there is any person of the name living, the lessor of the plaintiff, who is only concerned in the interest, may proceed in the suit.

3 Keb.
Rep. 372.

Also if plaintiff, who is only a trustee for the lessor, releases the action, he may be committed for the contempt *.

Salk. 260.
pl. 15.

* The con-

stant mode now is, to declare in a fictitious name, such as *John Doe*, &c. for the lessor of the plaintiff is the real party.

The

Carth. 288. The rule in the Common Pleas is, that the tenant in possession shall forthwith appear and receive a declaration; and this supercedes the necessity of an original writ, because the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unless a writ of error; but when a writ of error is brought, they must file an original, unless it be after a verdict, when it is helped by the statute 18 Eliz. c. 14.

a. Show. Also in the King's Bench, where a person may proceed as well by original as by bill, there is no need of an original nor of a *latitat*, or bill of ejectment; but before there be any proceedings, common bail must be filed for the casual ejector. But in case of a writ of error, the party must file a bill of ejectment, besides the plea-roll, before the errors are assigned.

Sid. 24. pl. 5. (a) In The court hath charged the plaintiff in ejectment after the declaration delivered, and hath (a) enlarged the term where the cause hath been long in agitation, and judgment entered against the plaintiff after he is dead.

Carth. 3. Comb. 13. 50. it is said, that the court will enlarge the term; but in Carth. 401, 402. 6 Mod. 130. Comb. 110. Salk. 257. pl. 8. it is said, that it cannot be done without consent of parties, although the plaintiff is hung up by an injunction in Chancery, or delayed by a writ of error brought in the Exchequer-chamber, for that this would be altering records; and it was the party's fault in not delivering a declaration of a term long enough to get judgment. [However, in a subsequent case, the term was enlarged without consent, from five to ten years. Oates v. Shepherd, 2 Str. 1272. And as the demise is now considered to be mere matter of form, the courts feel no difficulty in altering it, where the justice of the case requires it. Doe v. Pilkington, 4 Burr. 2447. Small v. Cole, 2 Burr. 1159. Goodright v. Strother, 2 Bl. Rep. 766. Roe v. Ellis, Id. 940. Vicars v. Haydon, Cowp. 841.]

2. Of adding proper Parties.

By Holt, C. J. Comb. 209. (b) To make the landlord a defendant in ejectment, is of right; for otherwise he might be prejudiced in his inheritance,

No person is admitted to defend in ejectment unless he be tenant, and is or hath been in possession, or (b) receives the rent, because it is an act of champerty for any person to interpose to cover the possession with his title. To make any person defendant with another, who was not concerned in the possession of the tenements, was a mischief at common law, because if the plaintiff recovered against one of the defendants, the stranger, who was acquitted, had no remedy for his costs. But that is remedied by 8 & 9 W. 3. c. 11. whereby costs are given to the persons "so acquitted," unless the judge certifies immediately on the trial, that the plaintiff had a probable cause for making him a defendant.

by combination between the plaintiff and tenant in possession. Salk. 257. pl. 10. So the landlord, though a peer. Comb. 339. or a member of parliament, must be joined, if he applies for it; for every person, who has any privilege, has it by law, which the courts cannot compel him to waive. Salk. 256. pl. 6. — [Such, it seems, was the right of the landlord at common law: yet, by stat. 11 Geo. 2. c. 19. § 13. it is enacted, "that the landlord may, by leave of the court, make "himself defendant with the tenant in possession, in case he appear; and in case such tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector. But if the landlord "shall desire to appear by himself, and consent to enter into the like rule as the tenant, in case he "had appeared, ought to have done, the court shall permit him" (as the court often did permit before the passing of this statute, see the authorities collected in 3 Burr. 1290.) "so to do, and order a "stay of execution upon such judgment until further orders." And by the same statute, § 12. "the "tenant being served with a declaration in ejectment must give notice thereof to the landlord, under "the penalty of three years improved rent." This penalty, however, does not attach on the tenant of a mortgagor who omits to give notice of an ejectment brought by the mortgagee in order to enforce

an attornment. *Buckley v. Buckley*, 1 Term Rep. 647. A lord, claiming by escheat, or it seems, a mortgagee, who is out of possession, (though as to the latter it hath been holden otherwise formerly, *Jones v. Williams*, Barnes, 194.) may be admitted to defend. *Fairclaim v. Shamtitle*, 3 Burr. 1299. So, the immediate heir of the person last seized, or remainder-man claiming under the same title with the original landlord. *Heblethwaite v. Roe*, 3 Term Rep. 783. n.; or, a devisee in trust, *Lovelock v. Doncaster*, 4 Term Rep. 122.; though they have never been in possession. But if the person who wishes to defend, be neither tenant, nor actual landlord, but have some interest to sustain, he must move the court, on an affidavit of the fact, to be made defendant instead of, or with the casual ejector, which may now be done without the consent of the tenant. *Sty.* 368. 3 Burr. 1290. And such *new* defendant may give a rule to reply, and *non pros.* the plaintiff, but cannot have costs. *Ward v. Badtitle*, 2 Rep. 760. And in no event will it be permitted to a lessee to defend alone against his landlord, or those who claim under him on a supposed defect of title. *Driver v. Lawrence*, 2 Bl. Rep. 1259.]—But a landlord may refuse to be made defendant. *Salk.* 256. pl. 6.—Where it was moved, that the wife of the lessor of the plaintiff might be made defendant, the plaintiff's title being by a pretended marriage, which was controverted, and the court inclined accordingly; but perceiving it to be a trick to gain time, and so to put off the trial, it was refused. *Salk.* 257.—One who is only a trustee need not be joined. *Comb.* 332.—If a material witness is also made a defendant, the right way is for him to let judgment go by default; but if he pleads, and by that means admits himself tenant in possession, the court will not afterwards upon motion strike out his name. *Dormer v. Fortescue*, Mich. 9 Geo. 2.

In ejectment, where there are two defendants for the same premises, and one appears and confesses lease, entry, and ouster, and the other does not, the plaintiff cannot proceed against the other, but he must be nonsuited, because both the defendants not admitting the demise, and the plaintiff not proving an actual entry and demise, he cannot maintain his declaration (a). But if there appeared any covin between such person not appearing, and the lessor of the plaintiff, the court will stop the judgment against the casual ejector, for the part of him who appeared, and oblige him who did not, to release the costs, because a declaration was delivered to each of them for their respective parts; and therefore, where one does not pay obedience to the rule, the plaintiff has judgment against the ejector for his part only.

that defendant entitles the plaintiff to judgment against the casual ejector. *Claxmore v. Raym.* 729. *Thrustout v. Foot*, Barnes, 149. *Ellis v. Knowles*, *Id.* 174.

And where there are several defendants, to whom the plaintiff delivers declarations, that are severally concerned in interest, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff must deliver several declarations to each of them; because each defendant must have a remedy for his costs, which he could not have if they were joined in a declaration, and the plaintiff prevailed only against one of them. And by this means the plaintiff might have a tenant of his own, defendant with others, in order to save the costs.

[But where several ejectments are brought for the same premises, upon the same demise, the court on motion, or a judge at his chambers, will order them to be consolidated.]

3. Of the Costs.

The parties by entering into the common rule are under the power of the court, by virtue whereof the court awards costs, which being taxed by the master, if demanded of the party, and

Vent. 255.
2 *Vent.* 195.
[(a) The practice in this case is now to proceed against the one who does appear, and to enter a verdict against the other, in-
derling ~~on~~ the *posse* the cause of such verdict, which as to

Sent. 1 Ld.

2 *Keb.* 524.

Crimstone v. Burgess, Barnes, 176.

Salk. 251.
pl. 14.
[If a ver-
dict be given
he

for the defendant, or the plaintiff he refuses to pay them, the court on affidavit thereof will grant an attachment.

be nonsuited for any other cause than the want of confession of lease, &c. the defendant must tax his costs on the *posse*, as in other actions; and sue out a *capias ad satisfaciendum* for the same against the plaintiff, which he must shew, under seal, to the plaintiff's lessor, and at the same time serve him with a copy of the consent-rule; and if the lessor, being required, refuse to pay the costs, the court, on motion, will grant an attachment against him. *Tilly v. Baily*, M. 6 G. 2.—If the lessor of the plaintiff die before the commission-day of the assizes, and the plaintiff be afterwards nonsuited, because the defendant did not confess lease, &c. the executor of the lessor of the plaintiff is not entitled to costs. *Thrustout v. Badwe*, 2 Wils. 7. But if he die after the trial of the cause, the executor shall have the costs, which had been taxed on the consent-rule. *Goodright v. Holton*, Barnes, 119.—If the tenant appear, confess lease, &c. and a verdict be given against him on the trial, the judgment thereupon is entered against the tenant, on which the plaintiff may take out execution, as in ordinary cases; for this is not a case provided for by the rule. *Runnig*, 415.]

2 Lev. 66.

6 Mod. 309.

12 Mod.

318.

Str. 402.

And although the plaintiff in ejectment be but a nominal person, yet if he be not to be found, or if he be not able to pay the costs, the attorney or solicitor is liable, or may be committed until he pay the costs, or produce a plaintiff that is able to pay them.

So, if a stranger carries on a suit in another's name, who has a title, and yet is so poor that he cannot pay costs; in case he fails, upon affidavit of this matter, the court will order such person, who carries on the suit, to pay costs to the defendant.

Str. 694.

2 Str. 932.

2 Barnard.

K. B. 140.

2 Kel. 55.

pl. 17.

[Ca. temp.

Hardw. 56.

1 Wils. 130.

Previously,

If an infant delivers a declaration to the defendant, some friend or guardian must be set up as plaintiff to answer the defendant's costs; but if such person dies insolvent, so that the defendant has no remedy, by this rule the infant himself must answer the costs, because the rule was entered into for the infant's benefit; and even infants must not disurb the possession of others by unlawful entries, without being punished with costs.

however, to any motion in court, inquiry should be made, whether there be a real and substantial plaintiff or not? for on inquiry, the guardian may undertake to pay the costs, in which case the court would probably decline to interpose. *Cowp.* 128.—It hath likewise been holden, that upon the death of the plaintiff's lessor, proceedings may be stayed, till the plaintiff shall have given the defendant security for his costs. *East v. Nonelly*, Barnes, 147. *Thrustout v. Grey*, 2 Str. 1046. So, where an ejectment was brought on the demise of a person residing at Antigua, *Cusack v. Jones*, H. 33 G. 3. B. R.; and in another case, where the lessor of the plaintiff resided in Ireland, the plaintiff was compelled to give the defendant a similar security. *Denn v. Fulford*, 2 Burr. 1177. In the latter case, the ejectment was brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment, and security had been there given to the amount of 40*l.* But excepting such instances, and that of a former ejectment, the court will not compel the lessor of the plaintiff to give security for the costs. *Doe v. Alston*, 1 Term Rep. 491.]

1 Keb. Rep.

827. pl. 1.

If there be baron and feme lessors in ejectment, and one dies after entering into the rule, the surviving person is liable to pay costs.

If ejectment be brought to be tried at bar to bring a matter in question, as the validity of a will, and a parcel of land be inserted in the declaration, which is not concerned in the question, but to which the plaintiff hath undoubted right, and the defendant confesses lease, entry, and ouster of the whole, not observing this part, the plaintiff shall not on this account be excused from the costs; but the court will give the defendant leave to retract his confession as to this parcel. The like was done in (a) a case where a parcel of copyhold land was inserted in the declaration, which was not touched by the will, no surrender being made to the use of the will.

(a) Mich.

27 Car. 2.

B. R. be-

tween Odd, e

and Preston.

(C) In what Case the Ancient Form is still to be adhered to.

WHERE the houses or things for which the ejectment is brought are (a) empty, in such case no declaration can be delivered, nor affidavit made thereof, by reason of which the court cannot proceed to give judgment against the casual ejector; and therefore it is necessary to proceed the old way, by sealing a lease on the land, and giving rules to plead, and when these rules for pleading are out, affidavit must be made of the whole matter; upon which the court grants judgment. But (b) there can be no judgment against the casual ejector without moving the court for that purpose, though the rules for pleading are out, because the court will not grant any judgment against the casual ejector, who is only nominal, without such proper affidavit, lest otherwise a third person should be tricked out of his possession.

door of the house or on some notorious place on the lands, in case the ejectment be for lands. [But a very little matter is sufficient to retain the possession; and therefore where the tenant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment was set aside, *Savage v. Dent*, 2 Str. 1064.] (b) Salk. 255. pl. 3.

So, if the tenant in possession kept his door shut, it was thought the best way to seal a lease on the land, and proceed in the old way: but in this case it seems, that if the practice and fraud of the tenant be made appear to the court by affidavit, the court will grant judgment against the casual ejector *nisi*.

It has been held, that where a corporation is lessee of the plaintiff, they must give a letter of attorney to some person to enter and seal a lease upon the land, for a corporation cannot make an attorney or bailiff but by deed, nor can they appear but by making a proper person their attorney by deed. They cannot therefore enter and demise upon the land in person as natural persons can; nor can they substitute an attorney to enter into a rule for their costs; nor will an attachment go against them for disobedience to that rule, and, by consequence, they are put to make an (b) actual lease upon the land, which lease must try their title, and then the attorney may proceed in the common method, which is not altered by the said statute.

or under the seal of the corporation; on a writ of error, it was held well enough; and that this being a fictitious action to try the title, the demise need not now be set out to have been by deed. 1 Ld. Raym. 136. [And the law is the same before verdict; for in *Farley on the demise of the Mayor, &c. of Canterbury v. Wood*, Kent Summ. Ass. 1794., where the declaration stated the lease to have been made to the plaintiff under the common seal of the corporation; it was objected that the lease ought to be proved; but Lord Kenyon said, that by the common rule and appearance the lease was admitted as stated. Runningt. 150. If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, the name of baptism must be inserted; because in the former case, the name wholly consists in its character; in the latter, in the individual person; therefore, there cannot be a sufficient specification of that person without mentioning his name. Dy. 86.]

Another instance, where the old method is still to be observed, is, where the several interests of the lessors of the plaintiff are not known:

(a) Est by 4 Geo. 2. c. 28. in all cases between landlord and tenant, in case there be no person residing in the house, or in case the declaration cannot legally be served, it is sufficient to affix it to the

(b) But in *Corth. 390. Patrick v. Balls*, in ejectment, where the plaintiff declared upon a demise made to him by the elder men and burgesses—without setting forth that it was by deed,

[(a) But there seems to be no necessity for so doing, even in this case; inasmuch as by the common rule, according to the modern practice, the lease would, of course, be admitted: and though there be several defendants, yet each appears and defends only for such part of the premises as is in his possession. Runningt. 151.]

So, where the proceedings are in an inferior court, there, they must proceed by actually sealing a lease, because they cannot make rules to confess lease, &c. in as much as such courts have not an authority to imprison for disobedience to their rules. And the reason is, the inferior courts having but a limited authority cannot make any new rules to bind persons that do not come in by proper process of such court; but the courts above, having an unlimited authority in every thing within their jurisdiction, shall bind any person that consents to their rules: and therefore in such inferior courts, the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expence.

If an ejectment be brought in an inferior court, and a *habeas corpus* be brought to remove it, and the plaintiff in ejectment declare against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

2 Keb. 119.
* Sed. qz.
as to a *procedendo*, if the inferior court has not an exclusive jurisdiction?

If a *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, and the lands lie within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*, because the title of the land is a local matter, properly within the jurisdiction of the court below, where, if they proceed regularly, they shall not be prohibited; but if the lessor has not sealed a lease on the premises, they will not*.

2 Keb. 69.

But if the lands lie partly within the *Cinque Ports* and partly without, the defendant cannot plead above the jurisdiction of the *Cinque Ports*; for though the land be local matter, yet the demise is transitory and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he takes proper measures for that purpose; yet if he will lay it above, since the demise is transitory, the defendant cannot stop his proceeding, because the courts above for such transitory matters have a proper jurisdiction.

Moor, 86.
Keb. 785.

If the defendant in an inferior court enter into a rule to confess lease, &c. and the cause be removed by *habeas corpus*, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against such judge for compelling obedience to their rules, and thereby obstructing the business of the superior courts, since the defendant is not bound by the rule he entered into in the inferior court, such rule being only the practice of the superior courts.

(D) Of the Declaration in Ejectment: And herein,

1. Of what Things an Ejectment will lie.

AN ejectment does not lie for a rent or common appendant, or other things that lie merely in grant, because these, being (a) incorporeal things, are in their nature invisible, *que nequo tangi nec videri possunt*; and therefore not capable of being delivered in execution (b).

appendant or appurtenant ejectment will lie, because the sheriff may give possession of such common, by giving possession of the land to which it belongs. *Newman v. Holdmyatt*, Str. 54. Andr. 107. So, it will lie for so many acres of land with common of pasture, *cum pertinentiis*. *Baker v. Roe*, Ca. temp. Hardw. 127.]

So, an ejectment does not lie *de quodam rivulo, &c. aquæ cursu*, called *locar* in L., for *rivulus sive aquæ cursus* lies not in demand; for *non moratur*, but is always flowing; nor (c) can execution by *habere facias seisinam* be made thereof, and therefore the action ought to be of so many acres of land *aqua coispet*: but if the land under the river does not belong to the plaintiff, but the river only, then upon a disturbance the remedy is by action upon the case only.

contrary. (c) For this reason an ejectment does not lie *de piscariâ* in such a river more than of a common appendant or rent: adjudged upon a writ of error upon a judgment out of Ireland, and the judgment for this reason reversed. Cro. Car. 492. 8 Mod. 277. But Jones said, perhaps an assize would lie for it, because it is *proficuum in certo loco capiend.* & vide Cro. Jac. 136. [And in the case of the *King v. Old Alresford*, 1 Term Rep. 354. Ashurst, J. is reported to have said, "there is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it, and it may be recovered in "ejectment"] An ejectment lies *pro stagno*, because in law the word *stagnum* comprehends both land and water. Yelv. 143. Co. Lit. 5. Regist. 227.—So, *de gurgite* is good for the same reason. Co. Lit. 5.

So, an ejectment does not lie *de pannagio*, because this is only the masts that fall from the trees which the swine feed on, and not part of the soil itself, as the herbage is.

But an ejectment lies of a boiary of salt; that is, where a man hath no inheritance in the soil in which there is a well of salt-water, but only a lease or grant of so many buckets of the water as will arise, (which are called the boiaries), and these are withheld from him, he may bring his ejectment for so many boiaries, as his grant was.

So, an ejectment lies for a coal-mine, because it is not to be considered as a bare profit *apprender*; but a coal-mine comprehends the ground or soil itself, which may be delivered on the execution; and though a man may have a right to the mine without any title to the soil, yet the mine itself being fixed in a certain place, the sheriff has a thing certain before him, to deliver in execution.

S. C. cited to be adjudged, Carth. 277. 4 Mod. 143. Comb. 201. Show. Rep. 364. pl. 2. 1 Burr. 627. Salk. 255.

Cro. Car.
262. Ward
and Petifer.

An ejectment lies *pro prima tonsurâ*, that is, if a man hath the grant of the first grafs that grows on the land every year, he may recover it in ejectment of him that with-holds it from him; for the first grafs, or *primâ tonsurâ*, is the best profit and grant of the property; and therefore he that hath it shall be esteemed the proprietor of the land itself till the contrary be proved; for the after-grafs or feeding is in the nature of commonage. As therefore he, that hath the first grafs or *tonsurâ*, has the most signal profit of the land, and may keep it longer or shorter on the land, according to the seasonableness of the year, it is but reasonable to give him this remedy against the person that ousts him of it, especially, when it is a fixed determinate thing, which the sheriff may put him in possession of; which distinguishes it from a right of common or other profit *apprender*: for the commoner cannot assign any one acre which he hath a right to separate from the rest of the commoners; whereas the grantee of the first grafs has in reality a right to the land itself till the crop be taken off; for no man can enter on the land till that be off, without being a trespasser.

Hard. 303.
401.

So, an ejectment lies *pro herbagio*, because the herbage is the most signal profit of the soil, and the grantee hath at all times a right to enter and take it.

Dal. 95.

(a) In Hard.
58. a case

is cited to have been adjudged, that ejectment lay not *de pasturâ*; [but see *Rex v. Piddlerenthide*, 3 Term Rep. 772. *Rex v. Tolpuddle*, 4 Term Rep. 671. *Bent v. Moore*, 5 Term Rep. 329.]

Cro. Car.

301. Jon.
321. 2 Ld.
Raym. 789.

3 Wilf. 30.
(b) This
remedy is
given only
to lay-im-
propriators,
and there-
fore the act

Although tithes are esteemed part of the incorporeal inheritance, and by the common law were only of ecclesiastical consufance; yet being in the hands of lay proprietors they are now considered as a temporal estate: for by the 32 H. 8. c. 7. it is provided, that every (b) lay person having any estate of inheritance, freehold, right, term, or interest in tithes, and being thereof disseised, ousted, wronged, or otherwise kept from the same, shall have his remedy in the courts of law for them in like manner as for lands; and hence it is that an ejectment lies for tithes.

of parliament leaves spiritual persons to pursue their old remedy in the spiritual court. Co. Lit. 299. Dyer, 116. pl. 71.—That an ejectment lies only for tithes in kind, but does not lie where the tithing consists *in modo decimandi*; but for this, and of the manner of suing for and recovering tithes, vide head of Tithes.

Litch. 62.

An ejectment lies *pro rectoriâ*, because a rectory consists of a church, glebe-lands and tithes.

11 Co. 25.

Style, 101.

Deeds, Pl't.

191.

Salk. 256.

pl. 7.

[In an eject-

ment for a chapel and lands in Hampstead, the court refused to make the chaplain a defendant, *quoad* his right of entry into the chapel to perform divine service. *Martin v. Davis*, 2 Str. 914. 2 Barnard. K. B. 27.—In the case of *the King v. Bishop of London*, it was said (*in argument*), that an ejectment would lie for a prebendal stall, after collation or admittance; for then it becomes a freehold. 1 Wilf. 14.]

2. What shall be a sufficient Description of those Things for which an Ejectment will lie.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover (a); for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded. But the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe*; because since the establishment of that real action (b), many things have been added and improved by art, and acquired new appellations that are perfectly understood now by the law, which are not found in the ancient law-books; and as men begun to contract by new names which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts.

which under the writ he is to deliver possession of; and is to take possession, at his peril, only of what he has title to; for if he takes more than he has recovered, and proved title to, the court will, in a summary way, set it right. 1 Burr. 620. 5 Burr. 2673.] (b) Hence it is said in Palm. 337. by Noy, *arguendo*, that an ejectment will lie of a hop-yard. [So, it will lie for *alder car*; a well-known term in Norfolk for land covered with alders. Baines v. Peterfon, 2 Str. 1063. So, for a *beast-gate*, a provincial term in Suffolk, importing land and common for one beast. Bennington v. Goodtitle, *id.* 1083. Andr. 106. S. C. So, for a *cattle-gate*, a Yorkshire term, said to be synonymous with *beast-gate*. Metcalf v. Roe, Ca. temp. Hardw. 106. 1 Term Rep. 137.]

But the judges did not extend this action as far as they went in an (c) *assise*, because the recognitors having the view of the thing demanded in the assise, must have more certain knowledge of the thing demanded than could be given in ejectment.

an ejectment will not lie *de crofto*, though an assise will. Style, 30. [But in Sty. 194. Roll, C. J. said, that an ejectment would lie in this case: and according to positive law (4 & 5 Ann. c. 16. § 3. 3 Geo. 2. c. 25. § 14.) and modern practice a view may (on motion in the usual manner) be had of the *locus in quo* in ejectment, as well as in the ancient assise, or any other action.]—But if an ejectment be brought for a *croft* and an acre of meadow, and the plaintiff have a verdict, he may have a special judgment for his acre of meadow, releasing the damages for the rest. Lev. 58.—Also, an ejectment will lie *de uno crofto vocat.* B. Lev. 58. *per* Twisden.

An ejectment lies of an *orchard*, because it is a word of a certain signification, though in a *præcipe* it must be demanded by the name of a garden; and it being well enough understood, the sheriff may with certainty deliver it upon an execution.

adjudged, because but a personal action, wherein damages are the principal. Roll. Rep. 55. S. C. Cro. Jac. 654. Palm. 337. S. P. adjudged. Hard. 55. S. P. by Baldwin, *arguendo*, Lev. 58. S. P. *per* Twisden.

So, an ejectment lies of (d) a *stable*, because it is a word of a determinate signification, and may be delivered by the writ of execution.

upon view of several precedents of recoveries *de stabulo*. (d) So, an ejectment lies of a cottage. Cro. Eliz. 818. Cro. Car. 555. Hardr. 57.

An ejectment of an house is good, though in a *præcipe* it ought to be demanded by the name of a messuage; because the ejectment

[(a) At this day, however, the practice is otherwise. The sheriff, now, delivers possession according to the direction of the plaintiff, who therein acts at his peril. The plaintiff himself must now shew the

sheriff that

Dyer, 84. pl. 85. (c) And therefore it hath been held, that

Noy, 37. Wright and Wheatley, adjudged. Cro. Eliz. 854. S. C.

Lev. 58. Lady Dacres's case, adjudged

Cro. Jac. 654. Roylston and

Ejection,
adjudged,
Palm. 337.
S. C. ad-
judged,
& vide
3 Lev. 97.
Hard. 76.
3 Leon. 210.
Noy, 109.
Hard. 37.
S. P.

is an action of trespass in its nature; and as a trespass, *wherefore he broke into the house* has been allowed; so it has been allowed to be good in ejectment: and the import and certain signification of the word *domus* or house is well enough understood in the law; for in waste the thing itself is recovered, besides damages, and yet the action of waste is given *de domibus*.

So, an ejectment of a chamber in the second story of such a house was held good, there being certainty enough to direct the sheriff in the execution.

[So, an ejectment for part of an house in *A.* hath been adjudged to be well enough. *Sullivan v. Seagrave*, 2 Str. 795. *Rawson v. Maynard*, Cro. Eliz. 286.]

Noy, 109.
Ford and
Lerk, ad-
judged.

But an ejectment *de coquina*, *Anglicè* a kitchen, is naught; for though the word is well enough understood, yet because any chamber in the house is applicable to that use, the sheriff hath not certainty enough to direct him in the execution, in regard the kitchen may be changed between the judgment and execution.

Gobb 53.
11 Co. 55.
Roll. Rep. 55
Bridge, 56.
adjudged,
being of an
uncertain
extent, and
that the
giving it a
name did
not help it;
but vide
Cro. Eliz.
235. 339.

... An ejectment lies not of (a) a close, because it is of an uncertain extent; nor will it mend the declaration, though the close be called by a particular name, because that also leaves the extent of it uncertain, so that the sheriff cannot tell what quantity of land to deliver in execution; and though the number of acres contained in the close should be mentioned in the declaration, and be set forth to belong to a messuage for which the ejectment was also brought; yet even that hath been (b) held too general, because the nature and quality of the land is thereby left uncertain, so that the sheriff is still at a loss what to deliver the possession of, as whether meadow, pasture, &c.

235. 339.
Cro. Jac. 654. which seems contrary. (a) An ejectment of a piece of land called *D.*, without shewing the contents, *Palmer's case*, Owen, 18.; the court was divided, but after adjudged that it was well enough, because it was but an action of trespass, and damages were the principal, though it would be otherwise in a *praescriptio*; but upon a writ of error in the Exchequer-chamber, this judgment was reversed. *Hetl.* 176. *Moor*, 422. pl. 587. (b) So, adjudged in *Savil's case*, 11 Co. 55. and the S. P. held and admitted to be law, in *Style*, 164. *Lev.* 212. *Bridge*, 56. *Hard.* 133. *Palm.* 102. 3 *Lev.* 97. *Salk.* 254. pl. 1. where *Savil's case* is affirmed to be law by *Holt*, Ch. Just.

Cro. Jac.
573.
Palm. 102.
4 Mod. 98.
[Comp. 349.]

But an ejectment for a close called *D.*, containing three acres of land, is good, because the quality of the land is mentioned, the word *terra* signifying in law arable land.

Cro. Car.
435.
Martin and
Nicholl,
adjudged, Cro. 471. S. P. adjudged, *Hard.* 59. S. C. cited. (c) So, where an ejectment was brought for five closes called *Furlong*; containing ten acres of arable and pasture; it was held naught, because not specified how many acres of each there were, so that the sheriff had no rule to govern himself by in the execution. Knight and Syms, adjudged, *Salk.* 254. pl. 1. *Holt*, 263. pl. 2. *Show*, 538. *Ca. th.* 2. 4. 4 *Mod.* 97. *Comb.* 193. S. C. — But an ejectment of twenty acres *jamorum & bruer.* is well enough, because intended of lands of the same nature, viz. heath, on which *gerse* and *furze* grow. *Cro. Car.* 19. *Mod.* 90. [So, in modern times, it hath been holden, that it will lie for fifty acres of furze and heath, and fifty acres of moor and marsh. *Connor v. Weit*, 5 *Burr.* 2672.]

An ejectment does not lie for a messuage and forty acres of land, meadow and pasture thereto belonging, (c) without distinguishing how much of one sort, and how much of the other.

Cro. Eliz.
126. void
and Paig,

An ejectment *de uno messuagio sive tenemento* is naught for the (d) uncertainty of the word *tenement*; for being of a more extensive signification

signification than the word *messuage*; consequently, it is uncertain adjudged. 1 Leon. 228. S. C.

what is demanded by the ejectment. Poph. 197. 203. Nov. 86. Cro. Jac. 125. Style, 364. S. P. Sid. 295. S. P. adjudged. [Barnes, 173. 2 Str. 834. 3 Will. 23.] (d) For this *vide* Cro. Eliz. 116. March, 96. 2 Roll. Abr. 80. [After verdict an ejectment for a messuage and tenement hath been holden good. Doe v. Denton, 1 Term Rep. 11.]

But an ejectment for a messuage or tenement called the *Black Swan* is good, because the addition reduceth it to a certainty of a dwelling-house. Sid. 295. 3 Mod. 238. 4 Mod. 136.

So, an ejectment for a messuage or burgage in *H.* is good, because both signify the same thing in a borough. Hard. 173. 2 Wile. Poph. 203.

An ejectment does not lie *de repositorio*, because it signifies a voider or cupboard, as well as a warehouse, and therefore uncertain what is demanded; but if it had been with an *Anglicè*, a warehouse; this had confined it to that particular thing. 2 Cro. Car. 555. Jon. 454. S. C.

An ejectment for one hundred acres of waste, or *pro centum acris* (a) *montis*, was held naught for the uncertainty, because both waste and mountain comprehend several sorts of lands; but for one hundred acres of (b) *bog* is good in *Ireland*, because the word bog there hath but one signification, and comprehends but one sort of land. Hard. 57. Hancock and Price, adjudged, because it may contain land of any quality.

(a) Palm. 100. Stafford and Macdonnough, adjudged upon a writ of error out of *Ireland*, and the first judgment reversed accordingly. Roll Rep. 166. S. C. But both are denied to be law in 9 Vin. Abr. 336. pl. 19 and Stra. 71. (b) Cro. Car. 512. Mulcary and Eyres, adjudged. Palm. 100. S. P. Salk. 254. pl. 1. Show. 338. S. C. cited, and admitted to be law. [So, it will lie for mountain in *Ireland*, because there, the word "mountain" is rather descriptive of the quality, than of the situation of the land. Lord Kildare v. Fisher, 1 Str. 71. So, for a "quarter" of land in *Ireland*; for it may be a term as well known there as mountain is; and that the courts will intend. 1 Burr. 623. 627. 629, 630. Cowp. 348. So, "20 villis et terris" in *Ireland*. 2 Keb. 745. 1 Burr. 627. In the case of Cottingham v. King, 1 Burr. 623. the following description was holden to be sufficient on writ of error, after judgment in the Common Pleas, affirmed by the King's Bench in *Ireland*; viz. "5000 messuages, 5000 cottages, 10,000 acres of land, &c. in all those the lordships, manors, and late dissolved abbey or monastery of Boyle and Infemacranaw, and quarter of land of Tullagh, with the town and tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roscommon: and all those the lands and hereditaments called Grangemore, and part of Sumternat, &c. a large deer park, &c. and the parsonage of Longford, &c. in the county of Roscommon: and a small park or field in the possession of, &c." This case was after verdict; and after verdict, an ejectment may be presumed to have been brought for such things only of which it will lie, 1 Str. 54.

The plaintiff in ejectment declared upon the lease of a house, ten acres of land and twenty acres of meadow, by the name of a house and ten acres of meadow, be the same more or less, and had a verdict, but the judgment was arrested; for the declaration was so repugnant and uncertain, that even the verdict could not help it, in regard the land mentioned in the declaration is of a different nature from that mentioned in the *pernomen*; besides the number of acres is so different, that the words more or less cannot reduce it to any certainty, for it were unreasonable to extend them to twenty acres more than was mentioned in the *pernomen*. Yelv. 166. 4 Mod. 143. Show. 364.

An ejectment for a manor seems ill, without describing the quantity and species of the land contained therein. Hetl. 146. Lit. Rep. 301.

Latch. 61. See Runnint. 129. An ejectment lies for a garden, by the name of three roods of land, for it may be sometimes used as a garden, and at other times ploughed. Godb. 6. adjudged, though it was said it might more properly have been demanded by the name of a garden. An ejectment *pro qua-*

cur molendinis is good, without saying wind-mills or water-mills, because both are comprehended under that name in the *register*. Mod. Rep. 10. pl. 55.—An ejectment *de decem acris pisarum* was held good; for the court held ten acres of peas, and ten acres sowed with peas to be all one, and therefore certain enough. 1 Brownl. 150.

2 Roll. An ejectment was brought for ten acres of (a) wood, and ten acres of underwood; it was insisted (in error) that this was a *bis petitum*; but the objection was disallowed, because plainly they are of different natures; and those who argued for the error seemed by their argument to have admitted it themselves, because they insisted that no ejectment lay of underwood, which shews it must be of a different nature from the wood: but that objection was also disallowed, because the nature of underwood is so well understood in the law, so that the sheriff will have certainty enough to direct him in the execution.

1 Burr. 626. 630. See too *Harebotle v. Placock*, Cro. Jac. 21.] (a) Where the declaration among other things was of so many *acres ligni* instead of *besti*, it was moved to amend it before the trial came on at bar; but it was denied, and the jury directed to find separate damages as to that particular. Carth. 402. cited to have been so ruled in the case of *Thompson and Leech*.

Goodtitle v. Alker, 1 Burr. 133. [An ejectment will lie for part of a highway; for though the publick have a right to pass over it, yet the freehold and all the profits belong to the owner of the soil, subject to the publick servitude or easement attached to it. But it must be described as *land*; and though it be built on, such a description will be sufficient.]

Yelv. 118. An ejectment was brought *de castro, villâ & terris*, without expressing the number and certainty of acres; and it was held ill on a verdict, and a writ of error brought thereon, because it was too generally demanded, and it was impossible for the sheriff to know what quantity of land he must deliver upon the *habere facias possessionem*.

31 Co. 25. An ejectment *de omnibus & omnimodis decimis in decem acris in Harpin's case*. Moor, 837. D., without saying *garbarum fœni, lana agnellozum*, or some other certainty of the nature or quality of the tithes, is ill, as it would be for one hundred acres of land, without expressing the several natures and qualities of the land; for in this action the plaintiff must be as particular and certain in his demand, as he would be of land.

11 Co. 25. But in this action the plaintiff is not obliged to set forth the quantity of every sort of tithe, as he must do of every sort of land, because it is in its nature uncertain, the quantity depending entirely on the goodness and fruitfulness of the land and seasons; and, therefore, an ejectment *pro quâdam portione grancrum & fœni* was held good, because impossible to say how much the quantity would be.

3 Lev. 96. An ejectment for a certain place called the *Vestry* in D. is well enough, because that place belonging to a church, and being called a *vestry*, is perfectly known, and therefore the thing demanded is sufficiently described to have execution thereof.

Carth. 277. In ejectment in the county palatine of *Durham*, the plaintiff declared upon a demise *de minerâs carbonum in parochia de D.* generally,

nerally, not saying how many mines, and had a verdict, and judgment upon a writ of error brought in *B. R.*: the error assigned was in the declaration, because of the uncertainty thereof; for not setting forth the number of coal-mines, so as the sheriff might know of how many to give possession; and for this reason the court inclined, that the judgment was erroneous; but then the plaintiff producing several precedents in *Durham*, and alleging that all the entries there in ejectments for coal-mines were the same as in this case, the judgment was affirmed.

tingham,
4 Mod. 143.
Comb. 201.
Show. 364.
Salk. 255.
pl. 2. S. C.

3. Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.

Although by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule of lease, entry, and ouster, which he is obliged to enter into; yet that being only designed for expedition in the trial of the right, and not to give the plaintiff a right of action which he had not at law; therefore it must appear by the declaration, that the plaintiff had actually the possession, and was ousted thereof by the defendant. Hence it is, that (a) if *A.* a lessee for years, makes a lease to *B.* at will, and *B.* is ejected, *A.* cannot have this action upon that ouster, because though the possession of *B.* was in law the possession of *A.*, yet the trespass *vi & armis*, which is complained of in this action, must be against the actual possession, and that was in *B.**

(a) Roll.
Rep. 3.
• But *A.*
may maintain an
ejectment,
if the person who
ousted *B.*
refuses to deliver up
the possession to *A.*
See the next
note.

So, if *A.* be lessee for years, the remainder to *B.* for years, and *A.* be ejected, and then his term expire, *B.* shall not have an ejectment on the ouster of *A.*, because the possession was not actually in him, and therefore he cannot complain of a trespass done to another.

Also, the lessor of the plaintiff must have a right of entry when this action is brought; for if his entry were taken away he is a disseisor, and cannot enter to make a lease to try the title; and therefore where tenant in tail makes a discontinuance, the issue in tail is put to his *foremedon*, and cannot have his ejectment, because his entry by the discontinuance is taken away.

Vide tit.
Discontinu-
ance.

Also, by the statute of limitations 21 *Jac.* 1. c. 16. none shall make an entry into lands, but (b) within twenty years after their right or title, which shall first descend or accrue to them; but this act hath the usual savings for infants, feme coverts, &c. which *vide* under title *Limitations*.

(b) Where
the plaintiff
was non-
sued, be-
cause not
able to prove
that he had

been in possession for twenty years. *Keib.* 681. *Hard.* 461. [Twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession, and gives a positive title to the defendant: for the plaintiff must shew a right of *possession* as well as of property; and therefore, the defendant need not plead the statute of limitations, as in other cases. 1 *Burr.* 119. And by *Holt, C. J.* "a possession for twenty years is like a descent which *rolls* entry, "and gives a right of possession which is sufficient to maintain an ejectment:" as where *A.* had the possession of lands for twenty years without interruption; *B.* then acquired the possession, on which *A.* was put to his ejectment: here, though *A.* was plaintiff, yet his possession for twenty years was deemed a good title, and he recovered accordingly. *Stokes v. Berry*, 2 *Salk.* 421. For, if no other title appears, a clear undisturbed possession for twenty years, is evidence of a fee. *Cowp.* 397.] This statute

shall not affect the king or his tenant. Hard. 176. 2 Leon. 206. Cro. Eliz. 331. — Nor a common person whose tenant has been in possession, and has paid the rent, for the possession of the tenant is the possession of the landlord. 2 Keb. 127. — So, the possession of one joint-tenant is the possession of the other, so as to prevent the statute from being a bar in the ejectment; so of coparceners. Salk. 285. pl. 19. *Vide tit. Joint-tenants, &c. vol. 3. 688-9.*

Cro. Jac.

511.

Lev. 170.

Sid. 123.

262. 344.

Saund. 12.

Raym. 135.

(a) For it

seems now

clearly

agreed that

the con-

fession of

lease, entry,

and ouster,

is not a

confession of any entry sufficient to make out the plaintiff's title, where an entry is necessary thereto, but the party must actually enter, as appears by Saund. 319. Sid. 233. Mod. 10. Vent.

42. 332. 3 Keb. 218. Salk. 246. pl. 2. Skin. 424. But by the stat. 4 Geo. 2. c. 28. in all cases between landlord and tenant, the landlord for non-payment of rent may deliver a declaration in ejectment, or serve the same, as by the statute is prescribed, and such serving shall be sufficient without a demand or re-entry. [(b) Under a proviso of this kind, the grantee must make his entry during the term, for the proviso operates no longer than the term continues. Johns v. Whitley, 3 Wils. 127. To avoid a fine, levied *with proclamations*, (though it is otherwise in the case of a fine at common law, Jenkins v. Prichard, 2 Wils. 45.) there must be an actual entry, and the action must be commenced within a year afterwards, and the demise must be laid subsequent to the entry. Oates v. Brydon, 3 Burr. 1897. Berrington v. Parkhurst, 2 Str. 1086. 4 Br. P. C. 353. In all other cases, Lord Mansfield said, the confession of lease, entry, and ouster is sufficient, 3 Burr. 1897. And in the case of Goodright v. Cator, Dougl. 483. it was ruled not to be necessary to take advantage, by ejectment, of the usual clause in a lease, to re-enter for non-payment of rent. However, the reporter of this last case, hints a doubt, whether an *actual* entry be not also necessary to prevent the operation of the statute of limitations, 21 J. 1. c. 15; and after citing Bull. N. P. 102. says, "to hold on a title at bar in Ford v. Grey, unless there be some special reason to the contrary." H. 2 Ann. B. R. 1 Salk. 235. *Actual* entry is also necessary (as the same reporter states) to enable a person who has recovered in ejectment, to maintain trespass for the mesne profits, against one who was occupier when the title accrued, but not at the time of the ejectment: Bull. N. P. 87.] And, note, that if a man enters and delivers a declaration in behalf of the lessor of the plaintiff; this is no entry to avoid a fine, unless an express authority was given for that purpose, because the entry must be pursuant to the intention, and that was to deliver a declaration in order to try the plaintiff's title, and not to make any title to the lessor of the plaintiff. Mod. 10. Saund. 319. Vent. 42. [But if a man enter on the premises, on behalf of the lessor of the plaintiff, though without any previous authority for that purpose, and the lessor afterwards assent to the entry, before the day of the demise laid in the declaration, such *assent* will be equal to an actual entry, and need not be either by deed or in writing. Fitchet v. Adams, 2 Str. 1128.]

Cro. Eliz.

800.

Noy, 33.

Note: That

in these

cases the

usual meth-

od now

is, to apply

to a court

of equity.

A. covenanted to stand seised of land to the value of 100 *l. per ann.* to the use of himself for life, and after to the use of his daughters, who should be unmarried at the time of his death, till they severally should receive and levy 500 *l.* a-piece, the remainder to his son; *A.* died the 30 *Eliz.* and the eldest son entered 42 *Eliz.*; the eldest daughter (there being four of them) brought her ejectment, but did not recover the lands, because her entry was taken away, she having passed the time allowed her to enter and receive the profits; otherwise she might keep the other daughters out of the perception of the profits: for if the eldest daughter lets the son enjoy during the time the profits may be levied, she lapses her time, and must therefore have remedy against the son who received the profits in her prejudice, and cannot charge the land with her

her portion which is then onerated with portions to be raised for the younger sisters.

The plaintiff must lay the commencement of his supposed lease in his declaration to have been preceding the ouster and ejectment by the defendant; for though such ouster be a wrong, yet it can be no wrong to the plaintiff if it was done before his title commenced; (a) as where the plaintiff declared on a lease made the 27th of *April anno primo regis*, and laid the ouster by the defendant to be the 26th of *April anno primo predicti*, this was held bad, because it was plain the plaintiff had no title till the 27th, and therefore that ouster the 26th was no trespass or injury to him.

So, if the lease had been made 27 *April, habend. a dict. 27 April. virtute cuius* the plaintiff entered and was possessed till the defendant *postea eodem 27 die Aprilis* did eject him; this is bad; because the ejectment was before the plaintiff's title commenced, for the lease did not commence till 28 *April*.

But if the lease be made the 27th, *habend. from thenceforth*, there, the ejectment may be laid the 27th, because the lease commences the 27th, and an ejectment may be the same day the plaintiff's title commences.

considered as a fiction, these cases cannot have much (if any) weight at present.]

But the law doth not necessarily oblige the plaintiff expressly to mention the day of the ouster, so it appears to be after the term commenced, and before the action brought; for where the declaration was on a demise the 25th of *March primo regis*, for three years, by virtue whereof the plaintiff entered and was possessed, until the defendant *postea, viz. anno supradicti*, entered and ejected him, without specifying the day of the ejectment; this was held good in error; for the action being commenced *secundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouster and ejectment were after the plaintiff's title commenced, and before the action brought.

Neither is the plaintiff, as it seems, necessarily obliged to allege the particular day of his entry in the declaration; and therefore where the plaintiff declared on a lease to commence at a future day, *virtute cuius* he entered, and was possessed till ejected by the defendant; this was held good on a writ of error, because it is said he entered by virtue of the lease, which could not be before it commenced, for he could not enter by virtue of the lease till the lease commenced: *aliter*, if the declaration had been *pretentu cuius* he entered, for the plaintiff might enter unlawfully, or before his time, under a pretence of the lease.

The plaintiff declares in ejectment in the Common Pleas, and after an imparlance (as the course of the court is) makes a second declaration; if in such case the plaintiff by the first declaration should lay the ejectment and ouster before the commencement of his term, or omit any matter of substance in the first declaration though the second were right, and the ouster were laid after his term commenced, yet the plaintiff shall not recover, because the declaration

Law Ejectm.
76.

(a) Yelv.
182.

1 Sid. 8.
3 Mod. 193.
Cro. Jac.
135. 258.
Cro. Jac. 96.
2 Bul. 29.
cont.

Cro. Jac.
253.
5 Co. 1.
[As the
lease is now
considered at present.]

Cro. Jac.
311.
Merrel and
Smith.

2 Roll.
Rep. 466.
Litch. 195.

Law Ejectm.
78. Cro.
Jac. 311.

declaration on the imparlance-roll is the material one on which the action is grounded, and must be supported by it, and the plea-roll is but a recital of the other, and therefore ought to begin with an *alias prout patet, &c.*

2 Vent. 174.
Sid. 432. And though the declaration in law relates to the first day of the term, because the term is in law considered as one day, yet the plaintiff may declare on a lease made some time after the first day of the term, and shall recover thereon. But then it must appear to the court that the declaration was filed after the day of the commencement of the supposed lease, for otherwise the plaintiff complains of an ejectment before he had title; and if the time of filing a bill were not examinable, the act of law, which makes the relation of bills to the first day of the term, would be an act of injury to the plaintiff, and delay his right; for then a man ejected out of a lease made in term-time could not complain till term was over.

Law Ejectm.
79, 80. but
vide Carth.
401, 402. The plaintiff declares on a lease made the 6th of *May anno 7* of the king, &c. setting forth, that the plaintiff was possessed *quousque postea* the defendant the 18th day *ejusdem mensis anno sexto supradicti*. ejected him: it was objected in arrest of judgment, that the ejectment was laid to be *anno sexto*, which was the year before the commencement of the lease, that being laid to begin the 6th of *May anno septimo*: but the declaration was allowed to be good by the court, because the ejectment was laid to be the 18 *ejusdem mensis*, which could not be if it were done in the 6th year, and therefore they rejected the word *sexto* as inconsistent and void.

Cro. Jac.
662. Rutter
and Miles. So, where the declaration was of a lease 22 *May, habendum a primo die Maii* for three years, *virtute cujus* the plaintiff entered and was possessed *quousque postea*, viz. *eodem die 5 anno*, the defendant ejected him; this on a writ of error was allowed a good declaration, though it was insisted, that *eodem die 5 anno* must refer to the first day of *May*, which was the last antecedent, and then the ejectment was laid to be twenty-one days before the lease was made.

Law Ejectm.
81. The plaintiff in ejectment declared, that whereas *J. S.*, by indenture the 9th day of *June* (without saying when it was made or delivered), did demise, &c. *habend. a die dat. sigillationis 5 deliberationis indentura predicta, virtute cujus* the plaintiff entered and was possessed till the defendant the same day ousted him. It was moved in arrest of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the sealing and delivering, being mentioned in the declaration: yet judgment was given for the plaintiff, because after a verdict the lease shall be intended not only to bear date, but also to be sealed and delivered the day mentioned in the declaration, which was the 9th, for all deeds are presumed to be delivered the day that they bear date, till the contrary appear.

Law Ejectm.
81. But where the limitation of the lease is altogether uncertain, the plaintiff cannot recover, because where the commencement of the lease is uncertain, the lease is void in itself, and then the plaintiff cannot have a title: besides, the court cannot possibly perceive

perceive whether the ejectment was before or after the plaintiff's title accrued, if such uncertain lease could give him one. Otherwise it is, where the limitation or commencement is impossible; for in such case the lease commences from the delivery, as if it had no date, and then the court may judge whether the ejectment is laid to be before or after the commencement: But there is this further reason for the difference, for the impossible limitation is rejected, because it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, and vitiates the whole agreement, because the court cannot reduce it to any certainty.

Thus, where the plaintiff declared on a lease, *habend. a die datús indenturæ prædictæ*. without mentioning an indenture before; this was held bad, for the uncertainty when the lease commenced. Hettl, 63.
Brady v.
Johnston.

But if the plaintiff had declared on a demise to him *per quoddam scriptum obligat. habend. a die datús indent. prædictæ*. this had been good, because the *scriptum obligatorium* shall be intended an indenture. Vent. 137.
2 Keb. 796.

The plaintiff declared on a lease of the fourth part of a house, in four parts to be divided, by force of which he entered *in tenement. prædictæ*. and was possessed till the defendant ejected him *de tenementis prædictis*. It was objected in error, that the plaintiff laid the ouster to be of more than by his lease he had a title to, for the ouster was *de tenementis prædictæ*. which at least must be understood of the whole house, and the lease was only of the fourth part: but the objection was over-ruled, because *de tenementis prædictæ*. shall be intended only of the fourth part of which the lease was made. Besides, it was but just he should recover as much as he had title to, though he laid his ejectment for more. Law Ejectm.
82, 83.

The plaintiff declared on a demise the sixteenth day of *January*, by an indenture dated the second day of *January*, without saying *primo deliberat.* the sixteenth; yet the declaration was held good; for though all indentures shall be presumed to be delivered the day they bear date, unless the contrary be shewn, and that therefore this lease must commence the second day of *January*, which, if true, would be a different lease from what the plaintiff declared upon; yet in regard he declared on a demise the sixteenth, it must necessarily be intended that it was delivered on the sixteenth, because it cannot possibly be a demise before a delivery, and therefore the delivery must necessarily be intended the day the demise is said to have been made, and not the day of the date of the indenture. Cro. Eliz.
890. Law
Ejectm. 83.

But where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that *J. S.*, by his indenture bearing date 1 *January*, did demise to him, so that it doth not appear by the plaintiff's own shewing, when the lease commenced, the law in such cases construes the delivery to have been the day it bears date; and so the declaration was held to be good, and not void for the uncertainty of the commencement of the lease, as was objected. Cro. Eliz.
773. Law
Ejectm. 83,
84.

Law Ejectm.
84.

Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule, and by that means the mischief of any variance between the lease declared on and the lease produced and proved on the trial is avoided, which was a danger the plaintiff was exposed to, and often miscarried in by the old method of proceeding; yet in the modern practice the plaintiff must take care to declare on such a lease as suits with his lessee's title. And therefore (a) if there be several lessors, and you lay the declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole, for the word *demiserunt* must be taken in pleading, according to the legal sense it bears; so that, if any of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them, for it is only his confirmation where he is not concerned in interest; and therefore the confession of this joint lease doth not help, because you do not confess the title by the rule.

(a) Cro.
Jac. 613.
2 Keb. 376.

6 Co. 14. b.
15. a.
Poph. 37.
Co. Lit. 42.
Jones, 305.
Roll. Rep.
299.
Raym. 142.
2 Jon. 137.

So, where the plaintiff declared on a lease made by *A.* and *B.*, and it appeared on the trial that *A.* was tenant for life, remainder to *B.* in fee; this on a special verdict was adjudged against the plaintiff, because it could not be the lease both of *A.* and *B.*; to pass the land *in presenti* to the plaintiff, for during the life of *A.* it could not be his lease only, because he was the tenant in possession, and *B.*'s joining in the lease amounted only to a confirmation, but could pass no interest during the life of *A.*; and therefore the allegation of the plaintiff, that *A.* and *B.* did demise, was not proved.

Show. Rep.
342.
2 Vent. 214.
Comb. 190.
Carth. 224.
[Heatherley
v. Weston,
2 Will. 232.
acc.]

(b) Where
ejectment
is brought
by one te-
nant in com-
mon against
another,
there must
be an actual
ouster of
one by the
other, else
he shall not
be compelled
to confess
lease, entry,
and ouster.
Per Holt,
C. J.

7 Mod 39.
[(c) Yet in
the old case

If the plaintiff declares on a lease made by *A.* and *B.*, and on the trial it appears that they are (b) tenants in common, the plaintiff cannot recover; but if *A.* and *B.* had been joint-tenants, a joint lease to the plaintiff had been good, and might have declared *quod demiserunt*; and the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several; and if they be disseised they shall be put to their several actions: as therefore the lands of tenants in common are to be considered as different estates depending upon different titles, the plaintiff shall not recover, because they were to allow the plaintiff to try two several and different titles in one issue at the same time; so that the plaintiff to make out his title must shew and prove that each demised the whole to him, else he doth not prove the declaration, whereas the discovery of the tenancy in common proves the contrary; for as they have different titles to a moiety only, so they could not each of them demise the whole (b). But joint-tenants are seised *per moy & per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so for the same reason too their lessee on their joint demise. And coparceners seem to stand on the same foundation and reason, because both coming in as one heir, the possession must be joint as that of joint-tenants (c).

cf Milner v. Robinson, Moor, 682. It was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiserunt*. Heretofore, to avoid difficulty in such cases, the way was for

for coparceners, joint-tenants, and tenants in common to join in a lease to a third person, and for that lessee to make a lease, after the ancient course, to try the title.]

In ejectment the plaintiff declared upon two demises of several lands by several parties, but laid only one *habendum*, viz. *habendum tenementa prædicta* so demised by the aforesaid several parties for seven years, and lays in his declaration, that the defendant entered into all the aforesaid tenements, & *ipsum* (the plaintiff) *a firmâ suâ prædictâ* (in the singular number) *ejecit, expulit & amovit*; and it was assigned for error, that the declaration was ill for want of another *habendum*, for that the verdict is general, and it is uncertain to which demise this single *habendum* relates: but the court held, that *reddendo singula singulis* it was well enough.

If the heir brings an ejectment, and pending the suit his ancestor dies, yet he shall not recover, because every man must recover according to the right he had at the time of the action brought; for during the lifetime of the ancestor the ejectment was done to him only, and therefore to be punished by the ancestor; for one man cannot complain in a court of justice of an injury done to another.

[A plaintiff cannot recover *against* his own covenant; and a licence to inhabit amounts to a lease.]

A lease made by a guardian to try the title of an infant seems good; for though such lease may be voidable as to the infant, yet a stranger cannot defeat it: and if the lessee should not be allowed to maintain his ejectment on such lease, the infancy would deprive the minor of that remedy of punishing the trespassor, which persons of full age are entitled to; which were to deny the minor the common right and privilege of other subjects.

135. And if the lessor of the plaintiff claim title as guardian in *feoffee*, he may be called upon to prove that the infant is not *fourteen* years of age. 1 Bl. Com. 461. 5 Term Rep. 471.—It has been long settled, that an infant himself may make a lease without rent to try his title. 3 Burr. 1806. 2 Term Rep. 161. 5 Br. P. C. 570.]

A man may bring an ejectment on a joint lease made by baron and feme, of the lands of the wife, if the lease were made by herself in person, whether it be by parol or indenture; for the contracts of the wife relating to her own estate are but voidable during the coverture, that she may have the benefit of them after the death of her husband, if they shall be for her interest to confirm them: but the husband ought to join in the lease, because they are considered in the law but as one person, and he having, during the coverture, an interest in the property of his wife, the whole proprietor would not join in the lease, without the husband: and as on such joint lease each may be said to demise the whole, the lessee might according to the ancient practice, maintain his ejectment on such demise. [But it was not necessary, that the husband and wife should join in a lease to try the title to her estate; he alone might make a lease for that purpose;] because during the coverture he hath the power of her property; and therefore all his

Carth. 224.
Furden and
Moore, ad-
judged in
B. R. upon
a writ of
error.
Comb. 190.
S. C. ad-
judged.
2 Vent. 214.
S. C. ad-
judged in
C. B.
Raym. 463.

Right v.
Proctor, 4
Burr. 2208.
Hard. 330.
[But a lease
made by the
testamentary
guardian of
an infant
is void.
Parry v.
Hodgson,
2 Will. 129.

2 Co. 61.
Cro. Jac.
332.
417. 617.
Cro. Eliz.
470. 498.
See Cowp.
201.
Doug. 53.

Cro. Jac.
322.

his contracts relating to it are good during his life, because his pleasure must determine her who hath resigned her will to him; though after his death she may avoid the lease.

Cro. Jac.
617. Gar-
diner and
Norman.

But if the plaintiff declares on a joint lease by baron and feme, and the lease appears on the evidence to have been executed by a third person, by virtue of a letter of attorney from the husband and wife, such evidence will not maintain the declaration, because she cannot delegate a power to a third person to act for her, having already devolved all power and authority on her husband. But the letter of attorney, though void as to the wife, remains as to the husband; and hence it hath been held, that the lessee might, in this case, declare on that lease as the lease of the husband only.

Cro. Eliz.
469. 535.
Owen, 18.
Latch. 199.
Hardr. 330.
1 Lutw. 803.

[A copyholder may declare on a lease for any number of years without forfeiture: and the lessee of a copyholder for a year, may sustain an ejectment; for his estate is warranted by law, and it is the most easy way for him to recover the possession.

Co. Lit. 398. a. 4 Co. 26. a.

Doe v.
Staple,
2 Term
Rep. 684.
(a) Good-
title v. Way,
1 Term
Rep. 735.

In ejectment, the plaintiff must recover on a *legal* title. Therefore (a), the trustee of a term for the benefit of creditors, not having notice of an agreement for a lease made previous to the grant of a term, has been permitted to maintain an ejectment against the tenant in possession under the agreement: for the title of the tenant, being only a doubtful equity, cannot be set up against the legal title of the trustee.

Roe v.
Lowe, 1 H.
Bl. 446.

So, it *seems* to have been determined, that if an *equitable* tenant in tail grant a lease for a long term, under suspicious circumstances of fraud or imposition, it will not prevent trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee. And in conformity with the principle laid down, the tenant, against whom his landlord had brought an ejectment, was deemed competent to shew that the title of the latter had expired; consequently, that he had no legal right to turn him out of possession.]

England v.
Slade,
4 Term
Rep. 682.

(E) Of the Plea and General Issue in Ejectment.

Law Ejectm.
89.

THE general rule in the issue of this action is, that whatsoever bars the right of entry is a bar to the plaintiff's title: therefore the plaintiff must prove seisin within twenty years in himself or his ancestors, or must prove a seisin in the person that has a particular estate in the land, and that he claimed within twenty years after the reversion accrued, or that he was an infant, *non compos*, imprisoned, beyond the sea, or, if a woman, under coverture, at the time when the title accrued, [and that he claimed within twenty years after he came of age, &c., for every plaintiff in ejectment must shew a right of *possession*, as well as of property; and therefore the defendant need not plead the statute of limitations, as in other actions.]

1 Burr. 119.

Fine and nonclaim, or a descent cast, which takes away the entry, are good pleas in this action in bar of the plaintiff's right of entry. *Vide tit. Fines and Recoveries, and Descent.*

Accord is a good plea in ejectment, as is also ancient (a) demesne. *9 Co. 77. Petoe's case, [(a) But*

this cannot be pleaded without leave of the court and affidavit. *3 Will. 51. 2 Burr. 1046.]*

(F) Of the Verdict and Judgment in Ejectment.

AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of: but a variance between the verdict and judgment, occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought. As, where the plaintiff had judgment *quod recuperet terminum* of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; here, though the judgment was larger than the verdict; yet because it appeared to be the misprision of the clerk, who had not pursued the verdict, which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for such misprision, since the statute of 8 H. 6. c. 12. gives the judges, in affirmation of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

If the plaintiff hath a verdict for all, the entry of the judgment is, that the plaintiff *recuperet terminum versus def. de & in tenementis prædict.* & (b) *quod def. capiatur.* *F. N. B. 220. Cro. Eliz. 144.*

seems, that since the statute 5 & 6 W. & M. c. 12. which takes away the *capias pro fine*, no judgment of *capiatur* shall be entered against the defendant, nor any thing in lieu thereof, but the clause shall be totally left out of the judgment: but then the plaintiff is to pay the officer, in lieu of the fine, six shillings and eight pence, which is to be allowed the plaintiff in his costs. *Carth. 390. Linley and Sir Talbot Clerk. 5 Mod. 235. S. C.*

But if the judgment in ejectment be entered *quod recuperet possessionem termini prædict.*, this is as well as if it had been *recuperet terminum præd.*, because both signify the same thing, the possession itself being to be recovered on the *habere facias possessionem*. *Law Ejectm.*

And hence it is, that if the term expires pending the suit, the plaintiff cannot recover the possession, because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record, that his title to it is determined; yet he (c) shall have his judgment for damages, because the trespass still remained. *Sav. 28. (c) Co. Lit. 285.*

In ejectment against baron and feme, the husband was acquitted and the wife found guilty; the judgment was *quod capiantur*; and held good, because that is only for the fine, which the husband must pay, for the wife cannot. *Cro. Car. 406. Mayo and Coghill.*

If the defendant be acquitted of part, and judgment be entered *quod def. sit quietus quoad* that part whereof he is acquitted; this is error, because the judgment in this action is not final, as in the writs of right, and the judgment in this action doth not protect *Cro. Eliz. 673.*

protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action. But since it appears that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part must be set down to be *quod def. eat inde sine die*; the plaintiff as to that having no farther cause to detain him longer in court.

(a) How far the death either of the plaintiffs or defendants makes an

If one of the defendants (a) die after a verdict, the plaintiff shall have judgment against the survivors, on his suggesting the death of one on the roll, but then the judgment must be entered as to the person deceased *quod quer. nil capiat, &c.* (b)

abatement, *vide* tit. Abatement, and Moor, 469. Cro. Car. 513—14. Jon. 401. Law Ejectm. 97—8. The death of one plaintiff or defendant, where there is another surviving, not to abate the suit. 8 & 9 W. 3. c. 11. § 7.—And the death of a party between verdict and judgment, not to be error, provided judgment be entered within two terms. 17 Car. 2. c. 8. [(b) This latter part of the judgment hath been holden to be unnecessary; because on suggesting the death, it is awarded by the court, "that further proceedings shall stay against the person deceased." 1 Burr. 363.]

Roll. Rep. 14. Cro. Jac. 356.

If an ejectment be brought against baron and feme, and the plaintiff have a verdict against both, and before judgment the husband die, the plaintiff may on the suggestion have judgment against the wife, not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another; but because where the wife is found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or, she had the whole possession in her own right; and in either case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be sued.

Vide tit. Sci. Facias. (c) Where the defendant in ejectment dying, a *scire facias* went out

ALTHOUGH after judgment the plaintiff is entitled to, and may sue out the writ of *habere facias possessionem*; yet if he neglect to sue out execution within a year after the judgment, he must bring (c) a *scire facias* (d), as on all other judgments, otherwise the court will award a writ of restitution *quia erronee emanavit*.

against the terre-tenants of the lands, the writ was demurred unto; for that the heir was not named, nor was it alleged that any strangers had intruded; but the court ruled it well, for the heir may come in as a terre-tenant. Sid. 317. 2 Keb. 143. But for this *vide* Cro. Car. 295. 312. Eyres and Taunton. Cro. Jac. 506. 2 Brownl. 145.—Where in ejectment there was judgment against the testator, and a *scire facias* against the executor, without naming him terre-tenant; it was objected, that in ejectment the defendant is supposed to be a disseisor, and that the lands descend to his heir at law, the plaintiff took out a new *scire facias* and amended the fault. Carth. 2.—Where judgment in ejectment was for two messuages, and after a year a *scire facias* upon it recited a judgment of one messuage only, to which *nul tiel record* being pleaded, it was moved to amend it, but denied, for there may be such a judgment; and this does not appear to be erroneous on the face of it. 6 Mod. 310. (d) It seems to have been doubted, whether a *scire facias* lay to revive a judgment in ejectment after the year, because by the common law it lay only in real actions; and at the time of Westm. 2. c. 45. which extends it to personal actions, the term or possession was not recovered in this action; but it seems now agreed, that a *scire facias* lies to revive the judgment in this action after the year, as well as in any other. Sid. 351. Okey and Viccars, Salk. 258. pl. 11.

[But if execution be taken out within, and continued beyond, the year, there is no necessity for a *scire facias*. No presumption can then arise, that the plaintiff hath released the execution; because, having been duly taken out, it may be owing to the neglect of the sheriff that it was not executed.]

If the plaintiff die within the year and a day, his executors cannot take out execution without a *scire facias*; for they are not parties to the judgment: though if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the court, and not from the party. The writ of possession has relation to its *teste*; therefore, though it be not actually sued out till after the death of the lessor of the plaintiff, yet if it be *tested* before his death, it is regular.]

But if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage and at his instance.

But it seems this delay of execution, being only the compromise or agreement of the parties, is never entered on the roll; and therefore after the year the plaintiff ought to move the court for the *scire facias*, lest the execution should be suspended *quia erroneè emanavit* after the year without the *scire facias*.

So, if the defendant brings a (a) writ of error, and thereby hinders the plaintiff from taking his execution within the year; and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *superfedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover the land or not.

he cannot take out execution after the year without a *scire facias*, because the courts of law do not take notice of Chancery injunctions as they do of writs of error: besides it might be no breach of the injunction to take out execution within the year, and continue it down by *vit. non misit breve*, [which, it seems, cannot be done in the case of a writ of error, because that removes the record out of the court where judgment is given; and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.] Salk. 322. pl. 9. 6 Mod. 388. S. C. Stra 301. — * But now, according to the case of Michel v. Cue, et Ux. in B. R. 32 Geo. 2. 2 Burr. 660. if a delay of execution for a year hath arisen from the defendants, by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*: and if a rule to shew cause why it should not be set aside is obtained, the court will discharge it with costs. And this seems founded on reason; and *quia* if this doctrine will not extend to cases in ejectment? — A *scire facias* lies upon a judgment in ejectment where a stranger enters after judgment. R. Lut. 1268. 3 Lev. 100. Clift, 676, 677.

[Tenant for years had judgment in ejectment: the term incurred: then he brought a *scire facias quare executionem habere non debet of the land*, and his damages and costs. The defendant demurred. It was holden by the court, that though the defendant might have a *scire facias* for the damages and costs, yet this being for the term likewise, which was incurred, it was ill; and a new *scire facias*

2 Inst. 471.
2 Leon. 77.
Runningt.
Lj. ct. 429.

Runningt.
ibid.
14 H. 7. 16.

Dec v. Roc,
4 Burr.
1970.

6 Mod. 288.
Roll Rep.
104.

Keo. 735.
6 Mod. 288.
and the
above au-
thorities.

5 Co. 88. a.
Cro. Eliz.
416.
2 Inst. 471.
6 Mod. 288.
(a) But if
the party
be tied up
by an in-
junction out
of Chancery
for a year,

Sedgwick
v. Gofor.
Skin. 161.

ought to issue. It was afterwards argued by *Holt*, that the *seire facias* was good for the damages; but the court thought otherwise, and a new *seire facias* was granted.]

2. How the Writ is to be executed.

1 Burr. 366. [As execution should be issued according to the right and justice
Runningt. of what has been really recovered, the plaintiff must be careful
Eject. 432. not to take out execution for more than he had right to recover.
And that the sheriff may not labour under any difficulty in exe-
1 Burr. 629. cuting the writ of possession, the practice *novu* is, (different indeed
from what it was formerly,) for the plaintiff himself not only to
point out to the sheriff that which, in execution of the writ, he is
5 Burr. to deliver him possession of; but to take possession, at his peril, of
2673. only that which he has title to: for should he take possession of
3 Willf. 49. more than he has recovered and proved title to, the court will, in
a summary way, interpose and set it right.]

5 Co. 91. b. The words of the writ are *quod habere facias possessionem*, so that
there must be a full and actual possession given by the sheriff, and
consequently, all power necessary for this end must be given him.
If, therefore, the recovery be of a house, the sheriff may justify
breaking open the door, if he be denied entrance by the tenant,
because the writ could not be otherwise executed.

[1 Roll. If the plaintiff recover several messuages in the possession of
Abr. 386.] different persons, the sheriff must go to each house and deliver the
possession thereof; and this is done by turning the tenants out of
each of the houses: for the delivery of the possession of one mes-
suage, in the name of all, is not a good execution of the writ, be-
cause the possession of one tenant is not the possession of the other,
but each hath his several possession.

Roll. Abr. But it seems by *Roll.* that if all the messuages had been in pos-
386. session of one tenant, it had been sufficient to give possession of one
in the name of all; but without doubt the surest and best way is,
for the sheriff to remove all the tenants entirely out of each
house, and when the possession is quitted, to deliver it to the
plaintiff.

Leon. 145. If the sheriff turns out all persons he can find in the house,
Upton and and gives the plaintiff, as he thinks, quiet possession, and after
Wells. the sheriff is gone there appear some persons to be lurking in
[24. Whe- the house; this is no good execution, and therefore the plaintiff
ther the shall have a new *habere facias possessionem*, because he never had
courts would execution.
not now hold
it to be a
full execution of the writ.]

Where the recovery was of land, and there was more demanded
than recovered, as suppose the demand for 500 acres, and a ver-
dict and judgment only for 100 acres, it seemed doubtful former-
(a) Roll. ly how the sheriff was to give execution. (a) *Roll.* says, it is suf-
Abr. 386. ficient to give the plaintiff possession of two or three acres in the
name of the whole. And this indeed seems the safest way for the
sheriff, when he executed the writ at his peril; for if he gave pos-
session of any land not recovered, and not in the *habere facias pos-
sessionem*,

sessionem, he was a trespasser, and punishable in an action of trespass. But because the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual possession be given of the whole quantity, it hath been held by (a) others, that the sheriff does not discharge his duty by giving one acre in the name of all; but he ought in such case to set forth all the acres particularly, otherwise it would leave the execution uncertain, and consequently, not give the plaintiff the full benefit and advantage of his judgment. But *note*, (b) at this day the practice is for the plaintiff to give the sheriff security to indemnify him from the defendant, and then the sheriff to give execution of what the plaintiff demands. (a) *Palm.* 289. [(b) 1 *Burr.* 629. 5 *Burr.* 2673.]

If the execution be for twenty acres, it seems the sheriff must give twenty acres, according to the common estimation of the county where the lands lie. *Roll. Rep.* 410.

3. How the Plaintiff is to be quieted, and what Relief he has when his Possession is disturbed.

And here it is further observable, that this writ of execution is only returnable at the election of the plaintiff; and the court, at the instance of the defendant, will not direct the writ to be returned. This seems to be left to the choice of the plaintiff, that he may take what is most for his advantage, in order to have the full benefit of his judgment: the best way to effect that is, to suffer him to renew the execution at his pleasure till full execution be had. For the plaintiff cannot renew execution after one *habere facias* is returned and filed, because it then appears on record, that the plaintiff hath had the benefit of his suit; and then the new execution is but *actum agere*, and, consequently, superfluous; and therefore the court will not oblige the sheriff to make any return, but at the desire of the plaintiff. *Roll. Abr.* 886. 2 *Keb.* 245. *Roll. Rep.* 353. *Palm.* 289. 2 *Brownl.* 253. 6 *Mod.* 27.

If the writ be returned by the sheriff, though not filed, it seems no new *habere facias* shall issue, because when the return is made, it becomes a record, which the court is entitled to. 2 *Brownl.* 216.

But where the writ is neither returned nor filed, there is then no act of record, by which it appears to the court that the plaintiff hath had any benefit by his judgment; and there upon a suggestion, *vic. non misit breve*, the plaintiff is entitled to a new writ, because the omission of the officer shall not turn to the plaintiff's delay or prejudice. But the new writ cannot issue till the return of the first writ be out; because till the return be past, *non constat* to the court, but the sheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment; in which case there can be no occasion for a new *habere facias*. *Palm.* 289.

If the officer be disturbed in the execution of the writ, on an affidavit the court will grant an attachment against the party, whether he be the defendant or a stranger: for the writ is the process of the court, and any disturbance given to the execution of it is a contempt of the authority of the court from whence it issues, and as such will be punished. The process is not understood to be

executed, nor the execution complete, till the sheriff and his officers be gone, and the plaintiff left in quiet possession.

Keb. 479.
Ratiff and
Tate.

But after the possession given, either on the *habere facias possessionem*, or agreement of the parties, the law seems to make a difference where the plaintiff is turned out of possession by the defendant, and where by a stranger. When it is done by the defendant himself, the plaintiff may have either a new *habere facias* or an attachment, because the defendant himself shall never by his own act keep the possession which the plaintiff has recovered from him by due course of law. But where a stranger turns the plaintiff out of possession after execution fully executed, the plaintiff is put to another action, or to an indictment for the forcible entry. For the title was never tried between the plaintiff and a stranger; and he may claim the land by title paramount to the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to. If the law were otherwise, the plaintiff might by virtue of a new *habere facias* turn out even his own tenants, who came in after the execution executed; whereas the possession was given him only against the defendant in the action, and not against others not parties to the suit.

(a) Style,
313.

Thus in the case of (a) *Fortune and Johnson*, the court was moved for an attachment against *Johnson*, for ejecting one who had been put into possession by an *habere facias*: but because it appeared that *Johnson* claimed under an elder judgment, the court would not make any rule in it, because it was title against title, and therefore left them to take their course at law.

2 Bl. Rep.
692.

[But in the case of a tenant, (who cannot be considered as a mere stranger,) it is otherwise. As in *Davis v. Doe*, an attachment was granted, and that absolute, in the first instance, against the tenant in possession, on an affidavit that he had been served with a rule of court, (which had been made absolute,) for delivering up the possession, and had refused so to do.]

Style, 468.
Law Ejectm.
113.

[(a) This decision is not entitled to much, if to any attention. For in the case stated, nothing can be more evident than that the execution was issued contrary to good law; and whenever that appears, the court, in the con-

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the residue of his term, and held it accordingly for some time, when the plaintiff took out an *habere facias* and executed it. The defendant moved the court for restitution on ground of the agreement; but the court would not grant it, but left the defendant to his action on the case on the agreement, for the judgment was entered absolutely (a). - But if the judgment had been entered with a *cesset executio* for such a time, and the plaintiff had taken out execution within the time, the defendant might have had restitution, because the judgment was entered with this limitation, that the plaintiff should not have the fruit of it till such a time. But *quare*, how could that appear to the court? since it seems the *cesset executio* is not entered on the roll. The difference seems to have been between a judgment by confession, and a judgment on verdict. Where the former is given with a *cesset executio*; if the execution be afterwards taken contrary to the agreement, the

court will set it aside, and lay the attorney by the heels: but where judgment is given on verdict, there, the verdict is the foot and ground of the judgment, and the court will not take notice of the subsequent agreement of the parties, but leave them to their remedy (a).

silence
exercise of
its summary
jurisdiction,
will inter-
pose and cor-
rect it.

Runngt. Eject. 437. (a) Yet according to the modern practice, if the truth be manifested to the court by affidavit, the party may obtain relief from its summary jurisdiction.]

(H) Of the Mesne Profits, and how to be recovered.

ALthough in ejectment the plaintiff, if he prevails, is to recover damages, yet the damages which he hath sustained by being kept out of the mesne profits are not (b) recoverable in this action; because it is never laid with a (c) *continuando*, and therefore comprehends only the damages sustained in the particular act of ouster complained of. [Indeed, the action of ejectment, as now conducted, is altogether a mere fiction, brought by a *nominal* plaintiff against a *nominal* defendant, for a *supposed* ouster, and of course for mere *nominal* damages. The object at this day proposed to be recovered by it is quite changed from what it was in its original state; for, as formerly, damages only were recoverable by it, and not the term; so now the term only is sought for by it, and not damages. For a satisfaction in damages, therefore, a subsequent action is to be brought, which subsequent action is in *form*, an action of trespass, *vi et armis*, but in *effect* to recover the rents and profits of the estate. It is in *form* an action of trespass, because it is consequent and as it were, supplemental to the action of ejectment, and therefore must necessarily be of the same species with it. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; but in either shape it is equally his action; for it is not in any manner affected by the fiction in the ejectment. And it may be brought in the name of the nominal lessee as well where the judgment is by default, as where it is upon a verdict; for there is no distinction between judgment by a default, and upon verdict; in the one, the right of the plaintiff is tried and determined against the defendant; in the other, it is confessed.

Pract. Reg.
C. P. 62.
[3 Will.
128.
2 Burr. 688.
3 Term
Rep. 17.
547. (b) It
seems cer-
tain, that
the plaintiff
may recover
the whole
mesne pro-
fits in the
ejectment;
and that is
apparent
from 16 &
17 Car. 2.
which en-
acts, that in
case the
judgment
be affirmed
on the writ
of error, the
court may
award a writ
of inquiry as
well of the
mesne pro-
fits, as of
the damages
by any waste
committed
after the

first judgment. Perhaps it may be answered, that the court will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get possession, and that it is never usual to recover more than small damages for the ouster, without any consideration had of the mesne profits. And it is certain the courts do frequently take that into consideration; otherwise the lessor would not be entitled to recover at all for the time laid in the declaration, since, by his own shewing, his lessee, and not himself, was entitled to the action. But if the plaintiff were, upon the judgment in the ejectment being affirmed in error, to have a writ of inquiry, it would probably, if rightly pleaded, prevent him from recovering any thing in a subsequent action of trespass; and therefore, if the demise were laid any time back, it would be advisable for the plaintiff in ejectment to take (as he may) judgment for his costs on the writ of error, without having any writ of inquiry. Bull. Ni. Pri. 88. In *Traherne v. Gressingham*, Barnes, 87. it is said by the court, that the actions for mesne profits (which are grown very fashionable) tend to create double expence: that the plaintiff should be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a second for mesne profits. (c) But it was formerly thought, that *antecedent* profits were not recoverable at law; and therefore it was usual for the plaintiff to go into equity for an account of the mesne profits. 1 Vern. 105. 3 Will. 113. 2 Burr. 688. 3 Term Rep. 17. 547.]

Runnngt.
Eject. 439.
Skin. 247.
Salk. 260.

If the action be in the name of the nominal plaintiff, the court, upon application, will stay the suit, till security be given for answering the costs: and if such a plaintiff release the action, his release will be set aside, as a contempt of court.

Lill. Pr.
Reg. 499.
2 Str. 960.

It was formerly holden, that if the action for mesne profits were brought in the name of the lessor of the plaintiff, or after a judgment by default, the defendant in such action was at liberty to controvert the plaintiff's title, the lessor of the plaintiff in the one case, and the tenant, who had never appeared, in the other case, being no parties to the record, and therefore no estoppel arising either against, or in favour of either of them. But it is now settled, that after a recovery in ejectment, the tenant is estopped from controverting the title in a subsequent action for mesne profits; provided the plaintiff proceed only for those profits from the time of the ouster complained of in the ejectment: but if he proceed for *antecedent* profits, he must prove his title to the premises whence they arose, to shew his right to receive them.

Dacosta v.
Atkins,
Hil. 4 G. 2.
Bull. Ni.
Pri. 37.
2 Burr.
688.

Barnes, 472.

Bull. Ni.
Pri. 37.

Hence it should seem, that in order to prove the plaintiff's title in an action for the mesne profits, it is only necessary to produce the judgment in ejectment; and so is the practice, where the judgment is after verdict: but after judgment by default, the practice is different: then, it is usual not only to produce the judgment, but also to prove a writ of possession executed. This latter proof, however, does not seem to be necessary; for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is, consequently, concluded from controverting his possession, because possession is part of his title.

Runnngt.
Eject. 442.

Bull. Ni.
Pri. 37.

But if this action be brought against a precedent occupier, the judgment in ejectment is no evidence against him; and therefore in such case, it is necessary for the plaintiff to prove his title, and also an actual entry; for trespass being a possessory action cannot be maintained without it. But it may admit of doubt what proof

Stanynough
v. Cousins,
Barnes, 456.

of an actual entry will be sufficient. It has been said, that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore, if a man make his will and die, the devisee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, so as to entitle him to recover the mesne profits from that time, and they rely on the case in 1 Sid. 239. which was trespass brought for the mesne profits *devant le lease*, and nothing said in the case about proving an actual entry antecedent to it. They say too, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to profits they would not otherwise be entitled to. However, supposing a subsequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years.

1 Roll. Abr.
tit. Trespass
per Relation.

In this action the plaintiff must prove the value of the mesne profits; for the judgment in ejectment does not prove any thing as to that. In estimating it, however, the jury are not confined to the mere rent of the premises; they may give *extra* damages, and after judgment by default, the costs in ejectment are recoverable, and are therefore usually declared for as damages, in the action for mesne profits.

Bankruptcy is no plea in bar to this action.

3 Will. 121.
2 Term
Rep. 547.

Goodtitle
v. North,
Doug. 584.
Birch v.
Wright,
1 Term
Rep. 386.

A plaintiff may, if he pleases, waive the trespass, and recover the mesne profits in an action for use and occupation. But in the action for use and occupation he cannot recover the profits any farther than to the time of the demise in the ejectment; for this action does not spring out of the ejectment as the action of trespass does, but, when applied to the same thing, is totally inconsistent with it, this being founded on a contract, that on a tort; in the one, the plaintiff says the defendant is his tenant, and therefore must pay him rent; in the other, he says he is no longer his tenant, and therefore must deliver him up the possession.]

(I) Of bringing a new or second Ejectment.

ONE of the advantages attending this action is, that a man may have a remedy *toties quoties*, he being allowed to bring as many ejectments as he pleases (a). But this has sometimes proved a very great mischief, and yet it seems to be without remedy: for though it has been attempted in Chancery, after three or four ejectments, by a bill of peace, to establish the prevailing party's title; yet it hath been always denied to alter the course of the law, for that every termor may have an ejectment, and every new ejectment supposes a new demise; and the costs in ejectment are a recompence for the trouble and charge to which the possessor is put. But where the suit begins in Chancery for relief touching pretended incumbrances on the title of lands, and that court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, it hath ordered a perpetual injunction against the defendant; because there the suit was first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent and inequitable against the possessor, it is within the compass of the court to relieve against them.

If a man has (b) a verdict in ejectment, and costs are taxed, and an attachment issues for non-payment of them, the defendant shall not have an ejectment against the plaintiff in the same court till he hath paid those costs; but he may proceed in ejectment in another court without costs paid: the reason is, because the same court will see an obedience paid to their rules before they will suffer the disobedient person to proceed in a cause of the same kind; but one court cannot take cognizance of the rules of

Sid. 279.
(b) So, if the plaintiff is nonsuit, he cannot bring a second ejectment, without paying the costs of the first.

Salk. 255. another court. [But this distinction now no longer prevails; and the courts of *Westminster Hall* consider a former ejectment in another court in the same light, as a former ejectment in the same court, 1 Salk. 255. Barnes, 255.] and will in either case equally stay the proceedings in a new ejectment, till the costs of a former be paid.

Doe v. Law, 2 Bl. Rep. 2158. A former ejectment had been brought in the King's Bench, where the defendant, in *Hilary* term 13 *Geo.* 3., obtained a rule for costs for not proceeding to trial, which were taxed at 85*l.* 8*d.* after which the cause was tried in the same term by a special jury, and a verdict for the defendant; and his costs were taxed on the *posse* on the 11th *June* 1777, at 273*l.* 10*s.*; total 358*l.* 10*s.* 8*d.*; no part of which was paid. It was moved in *C. P.* to stay the proceedings in this cause till the costs of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the *essoign-day* of *Easter* term 1777. Notice of trial was given for the sittings after *Trinity* term, viz. the 19th of *June* 1777. The plaintiff had been at the expence of preparing for trial, and bringing his witnesses to town; and the motion was not made till *Friday* the 13th of *June*. In support of the motion it was alleged, that the cause was so clear at the last trial, and the parties had rested so long, that the defendant did not think them in earnest till notice of trial was given. He then proceeded to tax his costs in order to ground this application, which otherwise he would not have done, the lessor of the plaintiff being insolvent. The court, on considering all the circumstances, made the rule absolute.

Doe v. Law, 2 Bl. Rep. 2180. An ejectment brought by the *fraudulent* assignee of an insolvent was stayed, till the costs of former ejectments, which had been brought by the debtor himself, were paid.

Smith v. Barnardiston, 2 Bl. Rep. 904. Where there is manifest vexation and oppression, the court will stay the proceedings in a second ejectment, even though the lessor of the plaintiff did not enter into a consent-rule in the former cause.

Benn v. Denn, Barnes, 180. But where the lessor of the plaintiff was in custody, under an attachment for non-payment of costs in a former ejectment, and brought a new ejectment upon the same demise, the court refused to stay the proceedings therein, till the costs of the former should be paid.

Roberts v. Cook, 4 Mod. 379. But *qu.* whether the courts would not now interfere, and consistently with the principle stay the proceedings; for though both actions be not commenced by the same person, yet, in truth, it is equally vexatious to proceed in the latter, till the costs of the former action be discharged? Runningt. Eject. 420. Though the principle of this rule be founded in a supposed vexation of the party, yet, where a defendant against whom there had been a verdict in a former ejectment, afterwards brought an ejectment against the former plaintiff, the court would not stay the proceedings in the latter till after the costs of the former ejectment were paid.]

Salk. 258. But no new ejectment shall be brought by the defendant after recovery against him, till he has quitted the possession, or the tenants have attorned to the plaintiff; so that he be in possession, and the defendant out.

[Where

[Where a defendant in ejectment, pending a writ of error, brings a new action, the court will stay the proceedings on the second ejectment, till the error is determined. So they will, pending a special verdict.] 1 Salk. 259.
Andr. 293.

Election.

- (A) In what Cases an Election is given.
- (B) To what Person : And herein of him that is to do the first Act.
- (C) Where it shall be said to continue, or be determined.
- (D) What shall be said a sufficient Election.

(A) In what Cases an Election is given.

IF a man grants twenty acres, parcel of his manor, without any other description of them; yet the grant is not void, for an acre is a thing (a) certain, and the situation may be reduced to a certainty by the election of the grantee. Keilw. 84.
2 Co. 36.
(a) But if a man sells 20 l. worth of his land,

parcel of a manor; this is void, it being neither certain in itself, nor reducible to a certainty, for no man is made judge of the value. 2 Co. 36. Keilw. 84.

So, if one being seised of a great waste (b) grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded; this may be reduced to a certainty by the election of the grantee: but it is otherwise in the case of the king's grant, for there can be no election in his case, and therefore the grant is void for incertainty. Leon. 30.
Noy, 29.
1 Co. 86.
(b) But if A. seised in fee of 100 acres makes feoffment

of eighteen, without any description of their situation, &c. it is void, and no election can reduce it to a certainty, because a feoffment with livery cannot operate *in futuro*. Roll. Abr. 725. N. Bendl. 148.
And. 11. Hob. 174. Moor, 181. S. C. & vide tit. Feoffment.

So, if a man levies a fine *come ceo que il ad de son done* of an house and an hundred acres of land in D. where he hath there an house and 118 acres, (c) the conusee may elect which 100 acres he will have, (d) for the election is given to him (e) by the fine. Roll. Abr. 725.
(c) Moor, 84. 102.
S. P. N.
Dyer, 280.
Margin. S. P.

(d) That *ce lui que use* shall have it. Moor, 102. pl. 247. 602. pl. 832. adjudged, — Where the devisee

devisee of two acres not ascertained shall have the election. *N. Dyer*, 280. margin.—Upon a covenant, in consideration of marriage, to stand seised of so much land as shall be of the yearly value of forty marks; it hath been a question, whether they, to whom the assurance was made, might enter into any part of the land of the value of forty marks, at their election, and hold the same in severalty; or if they should be only tenants in common with the other; and whether they may chuse one acre in one place, and one acre in another; and so through the whole land where they please? 3 *Lenn.* 27. & *vide Keilw.* 84. *Dyer*, 280. *Roll. Rep.* 187. *Lit. Rep.* 218. (c) But if the devise renders it back to the donor for a certain number of years, the donor hath the election given him, which hundred acres he will have, and he may elect. *Roll. Abr.* 725.

5 Co. 24. Palmer's case. Cro. Eliz. 819. Way, 32. Moor, 691. S. C. If a man grants 600 cords of wood out of a large wood, the grantee hath election to take them, when and in what part of the wood he pleases, without any appointment of the grantor, and, consequently, may assign his interest in them to a third person, and he shall have the like election.

Jon. 276. S. C. cited. Hob. 174. like point.

5 Co. 24. in Palmer's case. But if one grants to me 1000 cords of wood, to be taken at my election, and the grantor or a stranger cuts down part of the wood, I can take no part of that which is cut down, but must supply myself out of the residue still remaining.

Vent. 271. Motteram and Jolly. 2 Lev. 142. S. C. by the report of which A. But if A. covenants with B. that he shall have twenty of the best trees in the wood of A. to be taken at the election of B. within such a time; it is a breach of the covenant in A. to cut down any trees within that time, because the latitude of election which B. had is thereby abridged.

granted twenty of his best trees, &c. and adjudged the grantor should not take any in the mean time, at least without request to the grantee to make his election; and so it was not like Palmer's case, for that being only of so many loads of wood, it was sufficient if so many were left for the grantee.

2 Roll. Abr. 428. but for this vide head of Rent. If rent be reserved payable at the church of S. or D. upon condition, &c. the lessee hath his election to pay it at either place; and therefore to take advantage of the condition, the lessor must demand it in such places, where by his own agreement he has permitted the tenant to pay it.

Benson v. Benson, 1 P. Wms. 129. [Where money is agreed by articles to be laid out in land, the party, who would have the sole interest in the land, when bought, may elect to have the money paid to him, and that it shall not be laid out in land.

Short v. Wood, 1 P. Wms. 471. Edwards v. Countess of Warwick, 2 P. Wms. 173. So, if the party being adult, could by fine levied acquire the entire interest in the lands when settled (as tenant in tail with the immediate remainder to himself in fee): but otherwise, if a recovery would be necessary, as in case of a tenant in tail with remainder over.

Oldham v. Hughes, 2 Atk. 453. Trafford v. Boehm, 3 Atk. 447. Cunningham v. Moody, 1 Ves. 176. Countess of Holderness v. Marquis of Caermarthon, 1 Br. Ch. Rep. 377. *Contra*, Eyre's case, 3 P. Wms. 13. and Mr. Onslow's case mentioned in the note to Eyre's case.

Earlom v. Saunders, Amb. 242. Carr v. Ellison, 2 Br. Ch. Rep. 56. But this rule will not apply where an infant becomes so entitled; for an infant is incapable of making an election to vary the nature of his estate.]

(B) To what Person : And herein of him that is to do the first Act.

IT is laid down as a general rule, that in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the election. Co. Lit. 145.
2 Co. 37. a.
same rule.
[Doug. 14, 15.]

As, if a man grants a rent of 20 s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent by payment of one or delivery of the other. Co. Lit.
145. a.

So, if a man makes a lease, rendering a rent or robe, the lessee shall have the election. Co. Lit.
145. a.

But if I contract with you to pay you a robe, or twenty shillings, at *Easter*, you may, after the feast, bring debt for the one or the other. Co. Lit.
145. a.

So, if a man leases lands for years, reserving weekly nine quarters of wheat, or the value thereof, as it shall then be sold in the market of *W.*, if the lessee pays neither of these at the time appointed, the lessor may have his action, at his election, for the wheat only; for though the lessee might have paid any of them, at his election, at the day, yet after the day, the law gives the election to the lessor. Roll. Abr.
725. Denny
and Parnell.

If *A.* gives one of his horses in his stable to *B.*, *B.* hath the election which horse to take, for he is the first agent by taking the horse. Co. Lit. 145.
Moor, 82.
Dyer, 91.

If one grants to another twenty loads of maple to be taken in his wood of *D.*, there, the grantee shall have the election, for he ought to do the first act, *viz.* fell and take the same. Co. Lit.
145. a.

If one seised in fee of a manor aliens the manor, except one close called *N.* part of the manor, and there are two closes called *N.* which are part of the manor, and one contains nine acres, and the other but three acres, the alienee shall not chuse which of the said closes he will have; but the alienor shall have the election, which of the said closes shall pass. Leon. 268.
Sir Thomas
Lee's case.

If I have three daughters, and I covenant that *J. S.* shall dispose of one of them in marriage, it is at my election of which, and after request, I am bound to deliver her to him. Moor, 72.
pl. 197.
Dal. 73.
S. C.

If an obligation be conditioned to pay *B.* or his heirs annually 12*l.* at *Midsummer* and *Christmas*, or to pay him or his heirs, at any of the said feasts, 150*l.*, the obligor hath election to pay the 12*l.* or the 150*l.*, but he ought to continue the payment of the 12*l.* annually, until he pays the 150*l.* Though he may at any time determine the payment of the 12*l.* by payment of the 150*l.* Cro. Jac.
594. Abbot
and Rock-
wood, ad-
judged.

If *A.* covenants with *B.*, that *A.* or his son *C.*, or either of them, shall work with *B.* at the grinding and polishing of glafs, *B.* paying to each of them so much, &c. and *B.* requests *C.* to work with him, &c. if he doth not, the covenant is broken, for *B.* had the election to require both or any of them to work with him. 2 Sid. 104.
Sir Paul
Neeve and
Reeve, ad-
judged.

In

Lev. 54, 55.
Sayer and
Glean, ad-
judged.

In debt on an obligation, that if a ship put to sea, and either the goods or the obligor come safe, he should pay such a sum over and above the use allowed by the statute; the defendant pleaded, that the obligor died before he returned, and insisted, that he, as his executor, had an election to pay at which of the contingencies he pleased, and that therefore, the testator never returning, no action accrued: but it was resolved, that the payment should arise on either of the contingencies; and that this being agreeable to the intention of the parties, the law supplies the words, *which should first happen*.

(C) Where the Election shall be said to continue, or be determined.

Co. Lit.
145. a.
2 Co. 37.
Moor, 85.
Keilw. 78.

WHERE the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; otherwise, when to be performed *unicuique*.

Co. Lit.
145. a.
(a) Yet it
seems that
if a lessor
reserve
yearly a
rent, or
a pair of
spurs, and

As if I grant to another for life an annuity or robe at *Easter*, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he should bring it for the one only, and recover, this judgment would (a) determine the election for ever; for he should never have a writ of annuity afterwards, but a *scire facias* upon the judgment; which reason *Fitzherbert* (b) in his *Natura Brevium* not observing, held an opinion to the contrary.

the lessee fail of payment at the day, the lessor may distrain for either of them; for in this case the lessee loses his election only *pro hac vice*. Roll. Abr. 725. Co. Lit. 90. b. (b) Fol. 152.

Co. Lit.
145. a.
2 Co. 37. a.
Same rule.
(c) When
election cre-

When nothing passes to the feoffee or grantee (c) before election to have the one thing or the other; there, the election ought to be made in the lifetime of the parties; and the (d) heir or executor cannot make the election.

ates the interest nothing passes till election. Hob. 174.—As if a man grants one of his horses in a stable, the election must be made in the time of the parties. Co. Lit. 145.—But if a man gives one of his horses to A. and B., and after A. dies, yet B. may elect, because this was a thing in interest in them, and no express election limited. Roll. Abr. 725.—But if a man gives one of his horses to be elected by A. and B., if A. dies before election, B. cannot elect. Roll. Abr. 725—6. (d) For if he should, he should take as a purchaser, where named only by way of limitation. Leon. 254.

Co. Lit. 145.
2 Co. 36. a.
37. a.
Same rule.
Lutw. 303.
Co. Lit.
145. a.

But where an estate or interest passes immediately to the feoffee, donee, or grantee; there, the election may be made by them, or their heirs or executors.

When one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this; there, the interest passeth immediately, and the party, his heirs or executors, may make election when they will.

2 Co. 35.
Sir Rowland
Heywood's
case.

If A. being seised in fee of a manor, part in demesne, and part in a lease for years rendering rent, and part in copyhold, in consideration of a sum of money, by indenture grants, bargains, and sells

sells it to *B.* to hold for seventeen years from the death of *A.*, and after *A.* covenants to stand seised thereof to the use of himself and the heirs of his body, and dies, and *B.* enters; (*a*) he may elect whether he will take by the common law, or by bargain and sale, for *A.* had power to pass it either way; and if he should be obliged to take by demise at common law, then *B.* would lose the rents reserved upon the leases for years for want of an attornment. It was also holden, that this election remained notwithstanding the alteration of the estate by the second indenture, and the death of the lessor.

2 And. 202.
S. C. adjudged.
Poph. 95.
S. C. Hob.
159. S. C. cited.
(a) A bargain and sale is enrolled *quind. pajeb.* and at the same time the

bargainor levies a fine to the bargainee, he may elect to take by one or the other. 4 Co. 72. a. and for this *vide* 3 Leon. 16. 2 And. 161.

If a man levies a fine *come ces, &c.* of an house and 100 acres of land in *D.* (where he hath there 118 acres), and the conusee renders to the conusor for 100 years, and after the conusor dies, his executor may elect which of the 100 acres he will have, because this was a thing in interest in the testator.

Roll. Abr. 725.

[*A.* died indebted by one bond to *B.*, and by another bond to *C.*, and left *B.* and *J. S.* executors. *B.* intermeddled with the goods, and died before probate, and before any election made to retain. It was insisted, but the point was afterwards waved, that as *B.* might have retained the goods in his hands, his executors had now the same power. However, in a preceding case, where *A.* lent money on bond to *B.* who dying intestate, *C.* took out administration to him, after which *C.* dying, *A.* took out administration *de bonis non, &c.*, to *B.* it was determined (*inter al.*) that *A.* might, out of the assets of *B.*, retain for such bond-debt contracted before he took out administration; and though *A.* happened to die before he had made any election in what particular effects he would have the property altered; yet the court said, it must be presumed he would elect to have his own debt paid first, and this being presumed, there would be no difficulty as to altering the property; for as the executors of *A.* were to account for the assets of *B.*, they must, on that account, deduct the amount of the money lent by *B.* to *A.*]

Croft v. Pyke,
3 P. Wms.
185.

Weeks v. Gore,
Mich. 1725,
cited *ibid.*

There was a composition between the prebendary of *A.* and the abbot and convent of *B.*, that the prebendary of *A.* and his successors, for all time to come, should have their election yearly, either to receive tithes in kind of corn or grain arising within certain lands of the abbey, or else to receive five marks to be paid by the said abbot and convent in lieu thereof; so as such election was notified to the abbot, or any of the monks or porter of the abbey, &c. The lands came to the king by the 31st of *H. 8.* and from him to the defendant, and the prebend came to the king by the 1st of *Edw. 6.* of chanteries, &c. and from him to the plaintiff. Upon admitting the composition good, it was adjudged that the power of election was gone, because it cannot now be made according to the composition: but in this case, it was said by *Hale Ch. Baron*, that in one (*b*) *Southwell's* case, in 44 *Eliz.* where an abbot had a quantity of wood, to be taken yearly in such a wood, or a sum of money

Hard. 381.
Sir William Ingolby and Wivel.

(b) Which *vide* in Poph. 91.

money at his election; it was held, the election was transferred to the king by the statute of dissolution of monasteries.

Co. Lit.
245. a.
2 Co. 37. a.
S. P.

If one enfeoffs another of two acres, to hold the one for life, and the other in tail, and he before election makes a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the feoffee, by this wrongful act, hath lost his election.

Tyssen v.
Benyon,
2 Br. Ch.
Rep. 5.

[By settlement, previous to the marriage of the plaintiffs *Samuel Tyssen* and *Sarah* his wife, bearing date 24th September 1779, *Francis John Tyssen* deceased, the plaintiff's father, agreed to convey certain lands and other estates, and it being, among other parcels, recited, that certain farms, &c. at *Foulnden* in *Norfolk*, were of the rent of 550*l.* he covenanted before the end of twenty-four calendar months, to purchase lands in the county of *Norfolk*, sufficient to make up, with the farms at *Foulnden*, the sum of 500*l.* a year, and to convey the same to uses, or to convey other farms, &c. at *Hackney* in *Middlesex*, of sufficient value to make good so much as the farms, &c. in *Norfolk*, should be deficient of 500*l.* a year. By an indorsement on the deed (before the execution thereof) it was agreed by the parties, that it should be at the option of *Francis John Tyssen*, within twenty-four calendar months after the marriage, either to convey the lands according to the covenant, or to pay the trustees 12,000*l.* to be laid out in the purchase of other lands to be settled to the like uses; and in the mean time to be placed out at interest, and the interest to be received by the persons entitled, according to their respective interests. The marriage took place, and there was no issue, except a daughter, who was one of the plaintiffs. *Francis John Tyssen*, died 9th September 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his estates in *Middlesex*, *Essex*, *Norfolk*, and elsewhere, and gave and devised all his manors, &c., to trustees for payment of debts and legacies, and for other purposes, and to allow the plaintiff *Samuel*, such sum of money yearly during his life, as they should think proper, the remainder to accumulate during his life, and after his death to be laid out to certain uses therein declared. The conveyance, covenanted to be made by the settlement, having never been made, or the money paid; the plaintiffs filed their bill, praying that *Francis John* might be declared to have made his election to pay the 12,000*l.* or that an election might now be made: and if the persons interested should elect to pay the 12,000*l.* it should now be raised; and, if the election should not be considered as having been made, and should not be now made, that a proper part of the testator's estate in *Norfolk* should be conveyed upon the trusts in the marriage articles. The plaintiffs, by the bill insisted, that *Francis John Tyssen*, by the devise of the premises covenanted to be conveyed, (included in the general devise,) had made his election to pay the 12,000*l.* and if not so, that the defendants by letters and acts stated in the bill, had made such election. The heir at law and executors submitted the question of election, and said that the testator's debts having exceeded his personal estate, they had no fund

out of which to pay the 12,000*l.* but the real estate. Lord Chancellor said, that although the testator had covenanted to convey in twenty-four months, and therefore, after that time he had lost his election; yet, after that time, as it lay in recompences, the court would have permitted it to be made good; and, after his decease, he having given both his real and his personal estate to the same person, that person might perform either part of the covenant, and the court would not hold the devisee bound by the testator not having made his election within twenty-four months: but in the events which had happened, his lordship decreed the estate at *Foulden*, to be conveyed to the uses of the settlement, and to be made equal to 500*l. per annum*, by the conveyance of other parts of the estates.

If a testator is bound to settle within four months after his marriage, lands of 100*l. per annum* upon his wife, or to leave her 2000*l.*, and die within the four months, and the four months elapse without any election being made by the executors; yet, under such circumstances, a court of equity will enlarge the time, and relieve against the lapse.]

Eastwood
v. Vinke,
2 P. Wms.
617.

(D) What shall be said a sufficient Election.

IF a man gives two acres to another, to hold the one for life and the other in fee, and the donee after makes a feoffment of one acre; (a) this is an election to have the fee in that.

when one who is both executor and devisee enters generally, without claim or demonstration of election, he shall have the thing devised, as executor, which is his first and general authority. *10 Co. 47. b.*
vide Plow. 520. Cro. Eliz. 223. 2 Co. 37. b.

Plow. 6.
Roll. Abr.
726.
(a) That
of election.

If a man leases two acres for life, the remainder of one acre in fee, and after licenses the lessee to cut trees in one acre; this is an election that he shall have the fee in the other acre.

When the election is given to several persons, there, the (b) first election made by any of the persons shall stand.

same rule. (b) Where an election made by tenant for life shall bind him in remainder. *Moore, 102.*

Plow. 6.
Roll. Abr.
726.
Co. Lit.
145. a.
2 Co. 37. a.
Moore, 102.

As if a man leases two acres to *A.* for life, the remainder of one acre to *B.*, and of the other acre to *C.*, *B.* or *C.* may elect which of the acres they will have, and the first election by one binds the other.

2 Co. 36. b.

[Where a party shall be put to an election, see tit. "*Wills and Testaments.*"]

Error.

{a) Therefore differs from another writ or action.
Jenk. Rep.

25. 2 Inst. 40. Yelv. 209.—But yet, if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. Co. Lit. 238. b.—In a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shewn in the writ of error, how he is cousin; for it is but a commission to examine errors, and needs not such certainty as other writs. Cro. Jac. 160.

Co. Lit.
239. b.

This writ lies where a man is grieved by an error in the foundation, proceeding, judgment or execution of a suit.

But for the better Understanding hereof I shall consider,

(A) In what Cases a Writ of Error will lie: And herein,

1. In what Cases a Writ of Error is the proper Remedy to be relieved against an erroneous Judgment.
2. On what Judgments a Writ of Error will lie.
3. In what Court the Judgment must be given on which a Writ of Error will lie.

(B) Who may bring a Writ of Error, and against whom: And herein of the Persons necessary to be made Parties thereto.

(C) Of the Time of bringing a Writ of Error.

(D) Of the Manner of bringing it: And herein,

1. Of the Form of the Writ, and where the record shall be said to be removed.
2. What is necessary to be removed; and herein of removing the Record, or a Transcript.

(E) Of alleging Diminution and granting a *Certiorari*.

(F) Of the *Scire Facias*.

(G) Of

(G) Of the Proceedings after the Record removed :
And herein of the Abatement of the Writ of Error.

(H) How far the Writ of Error is a *Superfedeas*.

(I) To what Court a Writ of Error lies : And herein,

1. Of Writs of Error into Parliament.
2. Of Writs of Error into the Exchequer-Chamber.
3. Of reversing Judgments in the Court of Exchequer.
4. Of Writs of Error into the King's Bench.
5. Of Writs of Error in the Common Pleas and other Inferior Courts.
6. Where a Writ of Error lies in the same Court in which the Record is.

(K) Of assigning Errors : And herein,

1. Of the Manner of assigning Errors.
2. Of assigning Errors in Fact and in Law.
3. Of assigning that for Error which appears contrary to the Record.
4. Of assigning that for Error which is for the Party's Advantage.
5. Where the Matter assigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time.
6. Where Matters which might be assigned for Error are aided by a Release, and the Consent of Parties.

(L) What Defence the Defendant in Error may make : And herein of pleading a Release.

(M) Of the Judgment to be given on the Writ of Error : And herein,

1. Where on a Writ of Error, Part only, or the whole Judgment shall be reversed.
2. What Judgment shall be given on the Reversal of the first.
3. To what the Parties shall be restored on the Reversal of the first Judgment.

(A) In what Cases a Writ of Error will lie: And herein,

1. In what Cases a Writ of Error is the proper Remedy to be relieved against an erroneous Judgment.

(a) When a statute is erroneously acknowledged, as before one that has no authority, or if a statute merchant hath but one seal, &c. an *audita querela* lies, and not a writ of error; but if a statute is well acknowledged, and the execution erroneous, a writ of error lies. Cro. Eliz. 233. 810. Owen, 122. Dyer, 35. pl. 27. Leon. 233. — A judgment in a copyhold court reversed upon petition to the lord, and the party restored to his damages by *audita querela*. 4 Co. 30. b. — Where the fact assigned for error is in the suggestion of the writ itself, and not in any of the proceedings in the cause, no writ of error lies, but the party must bring an *audita querela*. Carth. 282. 4 Mod. 314. Salk. 262. pl. 3. but for this *vide tit. Audita Querela*.

23 Aff. 17. Therefore, if the tenant in a *cui in vita* dies seised (b) pending the writ, and after judgment is given against him, which is erroneous, and after the recoverer sues execution against the heir, and he brings an assise, he shall not avoid this judgment against his father, by saying, that his father died pending the writ; for the judgment is not void, but only voidable.

ant had died after verdict and before judgment, his heir could not avoid the judgment but by writ of error. Roll. Abr. 742. — Note, that this is aided by 16 & 17 Car. 2. c. 8. and cannot be taken advantage of on a writ of error; for which *vide tit. Amendment and Joinder*.

Roll. Abr. 742. Cole and Laue, adjudged. In an action upon the case, if the plaintiff be nonsuit, and after it be entered, that he *reliquit actionem suam, & fatetur se nolle ulterius prosequi*, upon which costs are assessed; though it be admitted, that this judgment is erroneous, because this is not any nonsuit, as it is entered; yet in an action of debt for the costs, the defendant shall not avoid it by plea without a writ of error; for it is a judgment *de facto* not void, but only voidable by Writ of Error.

Roll. Abr. 742. Cro. Eliz. 119. S. C. Leon. 101. S. C. If a man recovers against the principal, and sues a *scire facias* against the bail, they cannot say the principal died before the judgment, and (c) so avoid the judgment by plea, for it is against the record.

(c) But it is a good plea by way of excuse for not bringing in the body, but not to avoid the judgment, being a record, which must be avoided by writ of error. 2 Mod. 308. & *vide* Godb. 377. and *tit. Bail in Civil Causes*. [But by stat. 17 Car. 2. c. 8. the death of either party between verdict and judgment shall not be alleged for error, so as the judgment be entered within two terms after the verdict.]

2 Inst. 513. If a fine is levied without an original, or of more than is contained in the original, it is not void, but only voidable by writ of error. ERROR. and recoveries, *vide* head of Fines and Recoveries.

Roll. Abr. 742-3. Style, 246. S. C. for this *vide* head of Infancy and Age. If an infant suffers a common recovery, in which he comes in as vouchee in his proper person, and not by attorney or guardian; though this shall not bind him, but that he may in a writ of error avoid it, because it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reversed

versed it in a writ of error, because he himself is privy to the judgment, and may reverse it by such means, and he is not a stranger to the judgment; for judgment ought not to be subverted by matter *in pais*, without matter of record, as a recognizance or fine by an infant where he appears by attorney, and not by guardian.

If *A.* levies a fine to *B.*, who grants and renders to *A.* and his wife, and the heirs of the body of *A.*, this is not void as to the wife, though she is no party to the original, but only voidable by writ of error.

By the practice of the court of (a) *Common Pleas*, a defendant coming in by *capias utlagatum* the same term in which an exigent is returnable, may avoid the outlawry without writ of error, by shewing that he purchased a *superfedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c. or by shewing any other matter apparent on record, which makes the outlawry erroneous; as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and exigent, or other process, or the want of such addition as required by 1 *H. 5. c. 5.*

to be with a writ of error, *vide* 2 Hawk, P. C. *ibid.* and tit. Outlawry.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error, for the judgment being *quod suspendatur*, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence. But if judgment of acquittal is given upon such indictment, the king need bring no writ of error; but the offender may be newly indicted, for the judgment being *quod eat sine die*, &c. may be given as well for the insufficiency of the indictment as for the party's innocence.

And any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be falsified, by shewing the special matter, without writ of error, because it is (b) void; as, where a commission authorizes to proceed on an indictment taken before *A.*, *B.*, *C.*, and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only.

hostel, was void, and being *coram non iudice* might be avoided by plea. *10 Co. 77. a.* *vide* Lev. 23. 204. 234. Yet a writ of error also lies to reverse such judgment. *6 Co. 20. Roll. Abr. 744. Sav. 36. 2 Jon. 209.*

If one is attainted of felony, and after, by relation of a general pardon, the felony is pardoned, he shall be discharged, (c) for he hath no remedy by writ of error, or otherwise, to reverse the attainder.

law, as joint, where it should be several, it may be avoided by plea and judgment of the court in which the suit is depending, for there is no other remedy. *11 Co. 44. Godfrey's case resolved. 75. S. C.*

In debt upon a bond against an administrator, if he pleads a judgment recovered against the intestate, and that he hath not

3 Co. 5. a.

2 Hawk.
P. C. c. 50.
§ 1.
Roll. Abr.
742-3.
(a) But
whether an
outlawry on
the crown
side of the
King's
Bench can
be reversed
in the same
or different

tit. Outlawry.

3 Inst. 214.

3 Inst. 231.
Hawk. P. C.
c. 50. § 3.
(b) A judg-
ment in the
Marshalsea,
where none
of the parties
were of the
king's

Brownl. 24. &
Cro. Eliz. 302.

6 Co. 5. a.

(c) So, if a
fine imposed
in a leet be
unreasonable
or against

2 Mod. 308.
Randal's
case, & *vide*

Vaugh. 94. affects *ultra*, &c., the plaintiff may reply, that an action was brought against the intestate, and that he died before the judgment; and that after his death, judgment was given; for being a stranger to the judgment, he can neither bring error nor deceit, and has no way to avoid it but by plea*.

Gillb. Eq. Rep. 308. * *q. u.* If this could be done now, since the statute of 8 & 6 W. 3. c. 11. § 6. if there was an interlocutory judgment against the intestate in his lifetime, and final judgment after?

Cro. Eliz. 489. If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand, he cannot avoid this by writ of error, because he is convicted only, and not attainted. But the record being removed by *certiorari* into the crown-office, if there be a fault in the indictment, it may be discharged, and restitution awarded to the party of his goods seized for that cause.

Raym. 433. If a man had been indicted upon the statute of 3 Jac. 1. c. 4. for absenting from his parish church, and thereupon proclamations had been made, that he should render his body, &c. which not being done, he had been convicted according to that statute, yet no writ of error would have lain thereupon; for by the statute, after proclamations made and the default recorded, the same was a conviction of the offence; as if the statute gave process for the forfeiture; and if there was a fault in the record, the party's remedy was in the Exchequer to quash it there.

Co. Lit. 259. By the common law, *in favorem vite*, an outlawry of treason or felony might be avoided by plea, that the defendant was in prison, or in the king's service beyond the sea, &c. at the time of the outlawry pronounced against him. But it seems that no outlawry for any other crime against a party rightly described can be avoided by the plea of any matter of fact whatsoever.

2 Hawk. P. C. c. 50. § 2. One who purchases land of a person who afterwards is outlawed of felony, or condemned upon his own confession, may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchaser cannot falsify any more than the party, as to the point of the offence, but only as to the time.

Co. Lit. 288. b. 2. On (a) what Judgments a Writ of Error will lie.

(a) Whether it lies on a judgment given on a *habere corpus*. Salk. 504. pl. 1. No writ of error can be brought but on a judgment, or an award in nature of a judgment, for the words of the writ are, *fi judicium redditum sit*, &c.

Roll. Abr. 744. If the plaintiff be (b) nonsuit at the *nisi prius*, upon which costs are taxed by the same jury, by the statutes 23 H. 8. c. 15. 4 Jac. 1. c. 3. and judgment given for them against the plaintiff, the plaintiff may have a writ of error upon (c) this judgment.

Bennett, 1 H. Bl. 2432. Kempland v. Macaulay, 4 Term Rep. 436.] (b) A man may assign errors in law or fact, upon a judgment given against him by default. 19 Aff. 8. Roll. Abr. 675. S. C. (c) How upon a bill of exceptions, vide 2 Inst. 427. and tit. Bills of Exception.

If a man brings a writ of false judgment in the *Common Pleas* upon a judgment given in ancient demesne, and reverses the judgment there, a writ of error lies upon this judgment, for this is a matter of record. Roll. Abr. 744.

If a man is indicted for felony, and thereupon a *capias* and *exigent* is awarded, but he dies before any attainder, his administrators may have error upon this award of the *exigent*, because by the award of the *exigent* his goods were forfeited; and this is *ad grave damnum*, &c. though the principal judgment can never be given. 11 Co. 41. b. cited from the 18 H. 7. Rot. 3. Eaton's case. Cro. Jac. 359. Roll. Rep. 85. S. C. cited.

If one be outlawed upon an indictment of treason, felony, or trespass, but the process and order prescribed by the statutes of 6 H. 8. c. 4. and 8 H. 6. c. 10. are not observed, the outlawry may be reversed by writ of error, which (a) *ex merito justitie* ought to be granted. 3 Inst. 31. (a) Upon a case stated and referred to all the judges, it was holden

by ten of them, that writs of error were *ex debito justitie*, and not *ex mera gratia*, except in treason and felony; but Price and Smith held, that the subject could not of right demand them in any criminal case. 2 Salk. 504. but for this *vide* Roll. Rep. 175. 3 Bulst. 71. 2 Leon. 194. Sid. 69.—And note, that as the law is now settled, a person attainted of treason or felony, before he can have a writ of error to reverse his attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50. § 11.—Also, no writ of error for the reversal of an attainder of treason or felony is to be allowed without an express warrant from the king or the consent of the attorney general. 3 Mod. 42. Sid. 69. 2 Hawk. P. C. c. 50. § 12. Ld. Raym. 154. Vern. 170. 175.

A writ of error lies to reverse an attainder of high treason, though some have held the contrary, by reason of 33 H. 8. c. 20. that every attainder of treason by the common law should be as effectual as if by authority of parliament; for the statute is to be intended of law attainders by due course of law, and not of erroneous or void attainders; and so it was held in a parliament held the 28 Eliz. when it was enacted, that no attainder of high treason, where the party was executed for the same, should be avoided by plea or error: but this act extended only to attainders before that time, where the party had been executed, not to attainders after. 3 Inst. 215. & *vide* 3 Bulst. 71. Raym. 1, 2.

If one be convicted upon an indictment of recusancy for absents from church for one month, upon which judgment is given, that he shall forfeit 20*l.* but it is not *ideo capiatur*; this omission being apparently to the prejudice of the king, it was held a writ of error would lie notwithstanding the words of 3 Jac. c. 4. that no such indictment shall be avoided, discharged, or reversed, for want of form or other defect whatsoever, other than by direct traverse to the point of not coming to church. Cro. Car. 504. Marquis of Winchester's case, adjudged, and upon such error the judgment reversed accordingly, Jon 407.

the king by his attorney having signified his pleasure, that it should be reversed, if erroneous. S. C. by which report, the writ of error was brought by the king, and there held, that a writ of error lay for the king, for he was not concluded by the words of the statute of 3 Jac. c. 4.

If it be entered in an inferior court, that the plaintiff *recuperare debeat*, whereas it ought to be *recuperet*; this is (b) no judgment; so (c) no writ of error lies thereupon, for the words of the writ are *si judicium redditum fit*. Styls. 265. (b) That it is but an award, *vide* Roll. Abr. 751.

(c) Where the judgment was, that he should recover *super recuperationem*, where it should have been *super recognitionem*. Yelv. 157.

17 E. 3. 5.
b. 19. b.
Roll. Abr.
749. S. C.

In an assise of darrein presentment, if the parties demur upon the title, and it is adjudged for the plaintiff, and that he shall have a writ to the bishop; a writ of error lies upon this judgment before the damages inquired of, because there were no damages at the common law, and then the writ would lie presently; and the addition of damages given by the statute, to be inquired of by the sheriff, shall not stay the writ of error; and if it be affirmed, it may be inquired of the damages where it is affirmed.

17 E. 3.
21. 35.
Roll. Abr.
749-50.
S. C.

If a man recovers by default in a writ of *cessage* or *aiel*, a writ of error lies upon this before the damages are inquired of, because the damages are but an addition to the common law given by the statute; and so the judgment for the principal continues as it was at common law.

Roll. Abr.
750. Lord
Barkley and
Countess of
Warwick.
Cro. Eliz.
635.
Moor, 645.
Noy, 71.
S. C. ad-
judged.
Cro. Jac.
324. 2 Bulst. 104. like case adjudged, & vide 2 Roll. Rep. 125. 2 Bulst. 119.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ be directed to the sheriff to make partition, no writ of error lies hereupon, for the judgment is not complete till the sheriff's return, and the second judgment, which the law requires herein, viz. *quod partitio præd. foret firma & stabilis in perpetuum*; for before that, the plaintiff may be nonsuit, or he may, upon the return of the sheriff, suggest to the court, that the partition is not equal, and so have a new partition, and may also release before the last judgment.

12 Co. 39. b.
Cro. Eliz.
636.
2 Leon. 68.
2 Bulst. 119.
120.
3 Bulst. 233.
Godb. 258.

So, if in an action of account, judgment is given *quod computet*, and thereupon the defendant brings a writ of error; yet the record shall not be removed till the entire matter of the account be determined, *ne curia domini regis deficeret in iustitiâ exhibendâ*.

Roll. Abr.
750. but
for this vide
Brownl. 127.
31 Co. 40.
Roll. Abr.
760.
Style, 290. March, 88.

But if a woman recovers in a writ of dower, a writ of error lies before the writ of inquiry of damages awarded, and before the third part assigned by metes and bounds, for the judgment is perfect as to the realty, and the damages are given by the statute by way of addition.

Roll. Abr.
751.
Cro. Eliz.
235. 636.
Leon. 309.
Latch. 212.
Noy, 95.
Leon. 193.
Dyer, 291.
3 Bulst. 233.
Palm. 6.
2 Roll.
Rep. 126. Latch, 133. Style, 109. And. 145. March, 8. Keb. 327. and Carth. 205. S. P. per Holt, Ch. Just. [(a) If the defendant do not, at the trial, confess lease, entry, and ouster, according to the rule, he cannot have a writ of error; because, in such case, the judgment is against the casual ejector; and error cannot be sued in the name of the casual ejector, *Roe v. Doe*, Barnes 181. *George v. Wisdom*, 2 Bur. 757. neither can it be sued, in such case, in the name of the defendant, for he has not made himself party to the record.] (b) So, in debt, but otherwise in trespass and case, where the damages are the principal. Cro. Eliz. 255.

So, if the plaintiff recovers in an *ejectione firma* by confession, *nikil dicit, non sum informatus*, or demurrer, a writ of error lies before a writ of inquiry of damages executed (a); (b) for the judgment, *quod recuperet possessionem*, is perfect, and the plaintiff may presently have execution thereupon; and therefore, if the defendant were to be hindered from bringing a writ of error before a writ of inquiry executed, it might be in the plaintiff's power, by refusing to bring or execute the writ of inquiry, to delay the plaintiff for ever.

Rep. 126. Latch, 133. Style, 109. And. 145. March, 8. Keb. 327. and Carth. 205. S. P. per Holt, Ch. Just. [(a) If the defendant do not, at the trial, confess lease, entry, and ouster, according to the rule, he cannot have a writ of error; because, in such case, the judgment is against the casual ejector; and error cannot be sued in the name of the casual ejector, *Roe v. Doe*, Barnes 181. *George v. Wisdom*, 2 Bur. 757. neither can it be sued, in such case, in the name of the defendant, for he has not made himself party to the record.] (b) So, in debt, but otherwise in trespass and case, where the damages are the principal. Cro. Eliz. 255.

So, if a man recovers in *quare impedit* upon a demurrer, the defendant may have a writ of error before the writ of inquiry of damages returned, for such writ may be awarded out of the King's Bench, if the judgment be affirmed there. Roll. Abr. 750, 751. *vide* March, 89. Noy, 66.

If a man recovers in a *quare impedit*, and after brings a writ *quare non admittit* against the bishop, a writ of error lies on the judgment in the *quare impedit*, and the record shall be removed, though the other writ of *quare non admittit* be not yet discussed. Roll. Abr. 751. Godb. 439.

If a *quare impedit* be brought against two, and one plead to issue, and the other confess the action upon which judgment is given, he shall not have a writ of error till the matter is determined as to the other; for the writ of error must rehearse all that are parties to the original; and as to one, judgment is not given; and if the record is removed before the entire matter is determined, there would be a failure of right. 11 Co. 39. a.

If in a *formeden* the tenant has judgment for part, no writ of error lies until the entire matter in demand is determined, for the judgment is, *fi judicium inde redditum sit*, which word *inde* goes to the entire demand. 11 Co. 39. b. Dyer, 291.

If debt be brought against divers by several *præcipes*, and judgment given against one, he may have error before determination of the matter as to the others; for there being several counts, the record of his count and the pleading shall be severed from the original, and removed in *B. R.*, and yet the original shall remain in *C. B.*, for otherwise the court of Common Pleas could not proceed to determine the residue without the original. And my Lord Coke says, it seems to him, that in this case, if there be error in the original upon a *certiorari*, the chief justice shall only certify the tenor of it. 11 Co. 41. a. 2 Roll. Rep. 125. Dyer, 291. March, 89.

If in a *quo warranto* judgment be given as to part of the liberties claimed, that they shall be seised, and that the defendants *capiantur pro fine*, and as to the other part, *curia adversari vult*, a writ of error lies before any judgment given for the other part. Palm. 1, 2. adjudged upon a writ of error upon a judgment

given in a *quo warranto* against the corporation of Dublin. 2 Roll. Rep. 113. S. C. — * Error does not lie on a peremptory *mandamus*. Stra. 556. — Nor on a *mandamus* when the return is allowed. Stra. 625.*

3. In what Court the Judgment must be given on which a Writ of Error will lie.

No writ of error will lie of any judgment that is not given in a court of (a) record. (a) Not of a judgment given in an

inferior court, as the county-court, &c. Co. Lit. 288. b. Nor of a decree or sentence proceeding according to equity. 3 H. 6. 14. Bro. Error, 95. Roll. Abr. 744. — But of a judgment given in the limited court of Chancery, called the petty-bag, which proceeds according to the common law, and holds plea of *seire facias* for repeal of the king's letters patent, petitions, *monstrans de droit*, traverses of offices, *seire facias* upon recognizance, executions upon statutes, and pleas of all personal actions by or against an officer or minister of the court, a writ of error lies in *B. R.* Roll. Abr. 744. Dyer, 315. 4 Inst. 80. Plowd. 395. & vide Roll. Rep. 237. Moor, 570. Vern. 131.

The authority of the justices of *Trailbaston* was by act of parliament and by the general rule of law, and if they erred in judgment, a writ of error lay in *B. R.* to reverse their judgment. 2 Inst. 540. 4 Inst. 166.

Roll. Abr. 743, 744. Berry's case. 2 Jon. 167. S. C. cited, and a conviction upon the statute of hunting in a park, being removed by *certiorari*, exceptions allowed to be taken thereto. (a) Vent. 33. Like point *per Cur.* vide Raym. 389. where error was brought upon a conviction of a riot before justices of peace, and sheriff, upon the view, upon 13 H. 4. 7. (b) *Vide* Jon. 171.

Cro. Jac. 404. Rice's case adjudged. But if an erroneous judgment be given upon an indictment of barratry at the sessions of peace, and the party fined thereupon, and committed till he pays it, and he remove the indictment and proceedings by *certiorari*, and himself by *habeas corpus*, yet he cannot be relieved, unless he brings a writ of error.

Lev. 113. agreed *per Cur.* in the case of the King and Chaloner. Sid. 156. S. C. and S. P. *per Cur.* and said that a writ of error would not lie, because they were not a court.

Salk. 263. pl. 5. Ld. Raym. 213. 252. 454. Wherever a new jurisdiction is erected by act of parliament, and the court, or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgment; but where they act in a summary method, or in a new course different from the common law, there, a writ of error lies not, but a *certiorari*.

(B) Who may bring a Writ of Error, and against whom: And herein of the Persons necessary to be made Parties thereto.

Roll. Abr. 747. Dyer, 90. (c) Where in ejectment, error NO person can bring a writ of error to reverse a judgment, who was not (c) party or (d) privy to the record, or who was not (e) injured by the judgment, and therefore is to receive advantage by the reversal thereof.

may be brought either by lessor or lessee. Sid. 317. & vide ante. (d) As heirs and executors; but if an erroneous judgment be given against the person, the patron cannot have a writ of error. Godb. 377. — That error and attainr always descend to such person to whom the land should descend, if no such recovery or false oath had been. Leon. 261. (e) Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it. 5 Co. 39. Tey's case. — And for the same reason the assessor cannot assign any error in the grant and tender, because by that the estate which passed from him by his conscience is restored to him; and therefore he shall not be admitted to defeat the estate which by his own agreement he accepted. 5 Co. 39. b.

9 H. 6. 46. So, a writ of error does not lie against any, but him who is Br. Error, 9. Roll. Abr. 749. S. C. party or privy to the first judgment, his (f) heirs, executors, or administrators.

(f) F. N. B. 107. — If a man recovers land by judgment, and dies without heir, against whom the writ of error shall be brought, is left a *quære*. 9 H. 6. 49. Roll. Abr. 749.

Roll. Abr. 749. Roll. Ref. 352. And therefore on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although

although he hath nothing in the land, and not against the tenant; and on such writ the judgment may be reversed: but there must go (a) a *scire facias* against all the tertenants.

must go a *scire facias* against all the tertenants.

(a) That to reverse a fine or recovery, there Carth. 112.

Upon this rule, that none shall have a writ of error to reverse a judgment, but he who is privy to it, and hath some prejudice thereby; it hath been resolved, that if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error.

So, the younger son, when entitled to the land by the custom of borough english, shall bring the writ of error, and not the heir at common law; for this remedy descends with the land.

Leon. 261.
2 Sid. 56.
& vide Owen, 68.
Godb. 377.

Owen, 68.
Leon. 261.
4 Leon. 5.
adjudged,
& vide Bridg. 79. Roll. Rep. 311.

So, if there be an erroneous judgment, tenant in tail female, the issue female, and not the son, shall bring the writ of error.

Dyer, 90.
Leon. 261.
Roll. Abr. 747.

So, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and *J. S.* brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir, wherefore *J. S.* shall not reverse the fine, *quia de non apparentibus & non existentibus eadem est ratio*, especially in a court of judicature, where the judges cannot take notice of any thing that does not come judicially before them, and appear in the pleading.

Dyer, 89.
Cro. Eliz. 469.
3 Lev. 36.

If there be tenant in tail, the remainder in fee, and in a *præcipe* brought (b) against tenant in tail, an erroneous judgment be given against tenant in tail, and he after die without issue, he in remainder may have a writ of error; for when the statute *de donis* gave liberty to limit a remainder after an estate-tail, the law gave such actions to him in remainder as belonged to privies in estate.

3 Co. 3. b. agreed in the Marquis of Winchester's case. [Tenant in remainder may bring error at a common

recovery where the tenant in tail, *vouches*, dies before the judgment; and he need not set out a complete title, but only shew the connection and privy between him and the person against whom the recovery was had. *Sheepshanks v. Lucas*, 1 Burr. 410. In such case *scire facias*, or any warning to the *levy*, is not necessary. *Id.*] (b) So, if tenant in tail levy a fine, and before proclamation passes, a *præcipe* be brought against the vouchee, who vouches the tenant in tail, &c. for when the tenant in tail comes in as vouchee, it is as of his old estate; so that the privy between the tenant in tail and him in remainder continues. *Bridg. 69. Roll. Rep. 311.*

If tenant in tail male have issue a son and a daughter by one venter, and a son by another, and die, and the eldest son make a feoffment, and a common recovery be had against the feoffee, in which the eldest is vouched, and he vouch over the common vouchee, and after the eldest die, the youngest son may have a writ of error; for though the eldest should have rendered a fee simple to the feoffee, according to his loss, yet he should have recovered but an estate-tail, *viz.* such an estate as he had when

Leon. 261.
Owen, 68.
Godb. 377.

the

the warranty was made, which would have descended to the youngest, and, consequently, the writ of error shall be brought by him.

Roll. Abr.
747.
Dyer, 89.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity.

Leon. 317.
Cro. Eliz.
115. S. P.
adjudged,
and the fine
reversed

But if tenant for life, and he in remainder in fee, (being an infant,) join in a fine, the infant alone may bring error; for the error is in respect of the person of the infant, which is the cause of the action for him, and for no other.

quod the infant only: for this *vide* head of Fines and Recoveries.

Roll. Abr.
748. 755.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as vouchee.

Roll. Abr.
755. 795.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error; for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it, by taking advantage of any error in it.

Cro. Eliz. 2.
3 Co. 4.

If *A.* be tenant in tail, the remainder to *B.*, and *A.* suffer an erroneous recovery, and the common vouchee release to the recoverer; yet if *A.* die without issue, *B.* may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form; as he really has no interest in, or title to the land, so really neither does he make any recompence to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside a conveyance by which he is no way affected.

3 Co. 4.
(a) 8 H. 4.
5. Bro.
Error, 39.

If he in the remainder be made privy to the record by *aide* *prier*, he shall have a writ of error during the life of the tenant for life: so, (a) if he be received by default of the tenant for life.

49 E. 3.
21. b.
Roll. Abr.
748.

So, if a feme be received by the default of her baron, and lose the land by judgment, the baron and feme shall have a writ of error thereupon.

2 Co. 57.
Beckwith's
case. Cro.
Eliz. 129.

If baron and feme levy a fine, they may, by error, reverse the fine, for nonage of the feme, during the life of the baron.

18 E. 3.
25. b.
Dyer, 1.
pl. 5.

If the conusor of a statute aliens the land, and execution is sued against the alienee, he may have a writ of error upon the execution.

Roll. Abr. 748. this is made a *quare*, because, as there said, he is not privy thereto, for the execution goes of the land of the conusor; but Godb. 377. S. C. cited, and said, that otherwise there would be no remedy; for the conusor himself could not have error, because the lands were not extended in his hands.

Roll. Abr.
749. Co.
111, 112.

If pending a real action, the tenant aliens in fee, and after a recovery is had against him, he (b) himself may have a writ of

error, though he hath nothing in the land, because he is privy to the judgment after his alienation and tenant in law. Cro. Eliz. 294. Palm. 254. S. P. writ of error

and when he is restored, the alienee shall enter upon him. (b) But the alienee cannot have a writ of error for want of privity. 2 Aff. 2. Roll. Abr. 749.

But if a fine be levied of 120 acres of land, and he, that has right to a writ of error, make a feoffment of the whole, he shall never reverse the fine: but if the feoffment had been made, or a release had been given of 20 acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because he has not transferred his right to those, and therefore may be re-inflated, if the fine be erroneous. Roll. Abr. 788. Cro. Eliz. 468. Moor, 413.

So, if tenant in tail levies a fine which happens to be erroneous, and after suffers a recovery of part of the land only, of which the fine was levied; if the issue in tail brings a writ of error to reverse the fine, the tenant may plead the recovery in bar for that part, because for so much the recovery is an alienation, and therefore the issue shall never have a writ of error for that part of the land which he cannot have or enjoy, should the fine be reversed. Jon. 352. Roll. 789. Moor, 365.

(a) In a *præcipe quod reddat*, if the tenant disclaims, he shall never have a writ of error, (b) because by his disclaimer he has debarred himself of all right in the land. 8 Co. 61. Beecher's case. (a) 3 Leon. 176. S. P. *per Cur. arguendo*. Roll. Rep. 302. S. P. *arguendo*. (b) Otherwise, where the tenant demurs in despite of the court, or judgment is given upon his confession. 8 Co. 62. a. F. N. B. 21. — 20, if upon his default. 2 Roll. Rep. 127. Palm. 56.

In a writ of annuity against an heir, upon an annuity granted by his ancestor in fee; upon *non est factum* pleaded, if a verdict be found for the plaintiff, and thereupon judgment be given, that the plaintiff shall recover his costs, damages, and arrears of the land descended from the same ancestor, and thereupon a writ of execution be awarded to levy it of the lands descended; but no return thereof appear upon the record, and after the heir die intestate; his administrator cannot have a writ of error upon this judgment, in as much as he loses nothing thereby; for if it be levied, it is of the lands descended, the which, or the profits thereof, he cannot have, or be restored to it, if he reverses the judgment. Roll. Abr. 749. Franke and Stukely.

If J. S. binds himself and his heirs in a bond, and thereupon judgment is obtained against J. S., and J. S. makes his will, and his heir at law executor, and dies, leaving lands, which descend to his heir, yet he shall not have a writ of error as heir, for he is not privy to the judgment; and when an extent is made upon him, it is as tertenant: but after the lands are taken in execution, he may have a writ of error. Style, 38, 39. White and Thomas. Per Roll. * *Qu.* and see *post*.

If in a common recovery four husbands and their wives are vouched, the voucher shall be intended to have been in, in the right of their wives, and the heir of any one of the wives may have a writ of error; for this charge in the realty did not survive, and the heir of every of them being chargeable, the heir of any of

Leon. 291. Cravenor and Massey.

of them, and not of the survivor only, may have error: adjudged, where error was brought as heir to one of the husbands; but the plaintiff relinquished that, and brought a new writ, and entitled himself as heir to one of the wives.

3 Leon. 176. If in a *quare impedit* judgment be given against the bishop and incumbent, though the bishop claimed nothing but as ordinary, and so lost nothing; yet being privy to the record, he may for conformity join in error; for the plea of the bishop is not so strong as a disclaimer.

the Queen and Bishop of Gloucester, adjudged, Cro. Eliz. 65. S. C. adjudged; and Wray said, that the bishop had a loss, for that the writ shall be to the archbishop for admission and institution, so that the bishop having a loss may therefore join. *Vide* 3 Mod. 134.

Moor, 686. If execution upon a judgment is sued by *elegit*, and lands only extended, and after the defendant dies, his administrator may have a writ of error, for he is privy to the record, and may *in futuro* have loss by it.

Pl. 949. Scroggs and Lord Mor-
dant, ad-
judged,
Cro. Eliz. 294. S. C. adjudged, at the end of which a *nota* is added, that the execution of the land may be avoided, and then the administrator may be damnified.

Cro. Eliz. 225. If a man be outlawed for felony, and die, his executors may have a writ of error to reverse it, for they are (a) privy to the judgment, and possibly may have all the loss, as if the testator had only goods; and the objection, that the testator was attainted, and so had no goods, nor could make an executor, was held not material in this suit, which is to reverse the outlawry, by which the disability arises.

Marsh's case. Owen, 147. S. C. debated,
Leon. 325. adjudged, and the outlawry reversed accordingly; and by all the books it seems to be admitted, that the heir also might have had a writ of error in respect of the prejudice to him. 5 Co. 111. S. C. cited, Cro. Eliz. 558. S. C. cited. (a) *A.* being seized in fee, *B.* his eldest son, is outlawed for felony, *A.* dies, and *B.* enters and devises to *C.*, and dies, and *C.* enfeoffs *D.*, and whether *D.* could have a writ of error to reverse this outlawry? Godb. 376. debated.

Cro. Eliz. 528. If a woman recovers her dower and damages, and the tenant brings a writ of error, pending which the woman dies, he may have a writ of error against her executor to avoid the judgment as to the damages, for that is a grievance to him as well as the loss of the land.

Cro. Eliz. 558. If in a real action the land and damages are recovered, and the tenant dies, and his heir, who in respect of the land ought to have a writ of error, releases all writs of error; yet the executor of the tenant may bring a writ of error to avoid the judgment as to the damages, for he that hath a loss must have a remedy to redress it.

Bio. Error, 187. Roll. 747. If a judgment be given against *B.*, and the money of *C.* attached by force of a foreign attachment in London, *C.* shall not have a writ of error, because he comes in by garnishment by the custom, and is not party or privy.

Roll. Abr. 748. Hay-
ward and
Williams,
Stile, 254.
280. S. C. If an action is brought against *A.* as a feme sole, where she is a feme covert, and she pleads issue as a feme sole, and judgment is given against her, and she is taken in execution, she and her husband may bring a writ of error; for otherwise the husband may be

be prejudiced in the loss of the society and comfort of his wife, and of her care in his business and family; and he hath no (a) other means to help him. husband was a stranger, for he had no other remedy to prevent the loss of the society of his wife, being taken in execution. Roll. Abr. 759. S. C. 2 Roll. R. p. 53. S. C. *per Cur.* but because, in the assignment of error, it did not appear that she was married when the original was sued out, the judgment was affirmed. (a) But it is otherwise in the case of a fine, for the husband may enter and avoid it. Roll. Abr. 748. *vide tit. Fines and Recoveries.*

So, if an action be brought against a feme covert and others, they all with the husband may join in a writ of error. Roll. Abr. 747.

If there be three defendants, and they all appear by attorney, whereas one of them is an infant, and judgment be given against all; they must all join in a writ of error, for the judgment is entire, and cannot be naught as to the infant and good as to the rest. Style, 406. If an infant plaintiff, in ejectment, or any personal action, appear by

attorney, and obtain a verdict, the judgment shall not be reversed because of such appearance by attorney. Stat. 21 Jac. 1. c. 13. § 2. — But if an infant defendant appears by attorney, and judgment is given against him, error lies in the same court. Danvers's Abr. 2 vol. tit. Error, fo. 12. pl. 13. and the cases there cited.

So, if there be judgment against father and son, the son alone cannot bring a writ of error, for all the defendants ought to join in the writ; and if one of them refuse, he must be summoned and seivered; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener. Carth. 7, 8. Hackett and Herne. 3 Mod. 134. S. C. Yelv. 208, 209. S. P. [Walter v. Stokoe, 1 Ld. Raym. 71. Burr

v. Atwood, *id.* 328. Rous v. Etherington, 2 Ld. Raym. 870. Ginger v. Cowper, *id.* 1403. 1 Str. 606. Elkins v. Paine, 2 Ld. Raym. 1532. Ratcliffe v. Burton, Ca. temp. Hardw. 135. Vavasor v. Faux, 1 Will. 88. Knox v. Costello, 3 Burr. 1792. Laroche v. Walsborough, 2 Term Rep. 738. all S. P.]

But if in trespass against three, there is judgment against two of them by default, and the third justifies, and it is found for him, the two only may bring a writ of error, for he for whom the judgment is, cannot say, that the judgment was to his prejudice: also, in this case, the verdict and judgment for the third defendant will not help the want of an original *. Lev. 210. Hob. 70. & *vide* Style, 190. S. P. cont. * *Qu.* If the court will not give leave to file an original? Or, if an original is sued out, whether the court will take notice of the actual time of suing it? of the actual

If there be judgment against the principal, as also judgment against the bail, (b) the principal cannot have error on the judgment against the bail, nor (c) the bail on the judgment against the principal, nor (d) can they join in a writ of error any more than tenant for life, and he in remainder can join in such a writ; for these are several judgments, and affect distinct persons. (b) Roll. Abr. 749. 2 Leon. 4. Cro. Car. 408. 481. (c) Roll. Abr. 749. Style, 39. (d) Cro. Car. 300. 408. Jon. 360. Hob. 72. Cro. Jac. 384. Roll. Rep. 294. Cro. Car. 574. 561. Dult. 125. Lit. Rep. 93. Lev. 137.

But in (e) *Cro. Car.* it is said, that if the writ of error, by the bail, had recited the first judgment (as of necessity it must) and the judgment in the *scire facias*, and alleged the error in the second judgment, (e) Cro. Car. 481.

(a) Style, judgment, it had been well enough : but in (a) *Style* it is said, that of late such writ ought to abate for the whole *.

* The doctrine in the preceding clause I conceive is the established law.

Carth. 447.
Burr and
Atwood.

Where on a *scire facias* execution was awarded against the bail, who brought a writ of error, which was *tam in redditione judicii quam in adjudicatione executionis* against the bail, &c.; on motion to quash the writ the court agreed, that the bail was not entitled by law to a writ of error upon a judgment against the principal in the original action, and therefore quashed the writ of error *quoad* all that related to the judgment in the original action, and no more; and the writ was ruled to stand good *quoad* the judgment against the bail upon the *scire facias*.

(C) Of the Time of bringing a Writ of Error.

(b) 22 H. 6.
7. Roll.
Abr. 749.

It was (b) formerly holden, that a writ of error could not be brought before the judgment given; and if it bore *teste* before, it was no *superfedeas*, for the words of the writ are, *si judicium redditum sit*, &c.

(c) March,
140.
Vent. 255.
Moor, 461.
[1 Term
Rep. 280.]

But it seems now agreed, (c) that a writ of error that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution; but (d) the judgment must be given before return of it.

(d) 3 Keb. 308. Vent. 96. Latch. 133.—It may be returnable the same term judgment is given. Sid. 104.—The judgment, when entered, hath relation to the day in Bank, so that a writ of error returnable after in the same term, will remove the record. Mod. 212.—Where judgment is not given, the special matter may be returned, viz. that no judgment was given. Sid. 466. Vent. 96. & vide Sid. 311.—[If the plaintiff defers signing judgment till the writ of error is spent, then signs it, and brings debt thereon, the court will order a new writ of error, at the expence of plaintiff's attorney. Arden v. Lamley, Barnes, 250. Jaques v. Nixon, 1 Term Rep. 280.]

March, 140. But a writ of error, that bears *teste* before any plaint entered, is not good.

Vent. 255.
3 Keb. 308.

(e) Yet
when a
certiorari is
awarded be-
fore any indictment found, but one is found before the return, it should be removed; but for this *vide* tit. *Certiorari*.

So, where the defendant, upon an indictment of barrettry, brought (e) a writ of error, bearing *teste* before the assizes, it was disallowed, because, if such practice should obtain, it would disappoint all proceedings there.

By the 10 & 11 W. 3. c. 14. it is enacted, "That no fine or
" common recovery, nor any judgment in any real or personal
" action shall, from and after the first day of May 1699, be re-
" verfed or avoided for any error or defect therein, unless the
" writ of error, or suit for the reversing such fine, recovery, or
" judgment, be commenced or brought, and prosecuted with
" effect, within twenty years after such fine levied, or such reco-
" very suffered, or judgment signed or entered of record: Note,
" this statute hath the usual savings as to infants, feme coverts,
" persons *non compos*, in prison, or beyond sea."

(D) Of the Manner of bringing it: And herein,

1. Of the Form of the Writ, and where the Record shall be said to be removed.

THE law does not seem to require the same exactness in writs of error as it does in other writs; therefore, it has been holden, that in a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shewn in the writ of error, how he is cousin, for it is but a commission to examine the errors, and needs not such certainty.

Neither need the plaintiff in error shew a title in a writ of error, unless it be in a special case, varying from the common course; as, where a special heir in tail brings error, or he in remainder, because he is to entitle himself to the writ.

So, if a man brings a writ of error, to reverse an outlawry, it need not be shewn in what action it was.

But great certainty was formerly required in making the writ of error agree with the record; for as the writ was the sole authority by which the judges were impowered to examine, &c. they could proceed only on that record which the writ or commission authorized; nor could the defects herein, before the 5 Geo. 1. c. 13. be amended, because by the former statutes of amendment the judges were only enabled to amend in affirmance of judgment.

Therefore, where a writ of error was brought upon a judgment *in quadam loqueli* by writ of certain land and pasture, without shewing in what action this plea was, it was held naught.

If an ejectment is brought against seven, and one dies, and judgment is given against the six, and laid *ad damnum* of the seven, the writ shall abate; though it might have been otherwise if the writ had concluded *ad damnum* of the six only.

If the writ of error had mentioned the seven only, according to the record, and concluded *ad damnum* of the six, it had been well.—If one of the parties is dead, yet he ought to be named in the writ of error. 2 Mod. 285. 1 Ld. Raym. 71. Carth. 368. 1 Stra. 606.

If in a *quare impedit* in *C. B. George Shirley* baronet recovers against *Underhill*, and he brings a writ of error, reciting a record between *George Shirley* knight and baronet and *Underhill*, and thereupon the record and proceedings are sent in *B. R.* and a *mititur* entered upon the roll, (a) yet the record is not removed.

Roll. Ch. Just. who said the variance was material, *i. e.* these additions are made part of the name; otherways, where one is named gent. in the record, and yeoman in the writ.—Where a variance in the addition shall abate the writ. Sid. 104.—Where it was moved to quash a writ of error *inter A. and B. nuper de Kelsey in com. Warwick gent.* and the record certified was, *inter A. and B. nuper de Kelsey in com. Lincoln gent.* it was doubted, whether this variance in the addition would vitiate the writ, for that the addition was not of necessity; and at one time it may be, he was of one *Kelsey*, and at another time of another. Sid. 193. Keb. 117.—But for variances between the writ and record, *vide* Cro. Eliz. 92. 172. 198. Roll. Rep. 16. 2 Bull. 167. 174. Style, 193. 407. where the court by consent of parties made a rule to proceed in the writ of error, notwithstanding a variance for which it ought to have abated; of which the reporter makes a *quare*, the record not being well removed.

Cro. Jac.
160.

Cro. Jac.
161.
[1 Burr.
410.]

Roll. Rep.
22.

Vide tit.
Amend-
ment and
Jeofail.
Carth. 368.

2 Roll.
Rep. 22.
Watson and
Bernard.

2 Roll.
Rep. 210.
Palm. 152.
adjudged;
but, *per*
Dodderidge,

ad damnum of
the writ of error.

Hob. 327.
Hutt. 41.
Cro. Jac.
633. S. C.
(a) Style,
153. Like
point *per*

Style, 344.

A writ of error was brought to remove a record *in curia manerū de Cuttingby*, where the record was, *in cur. custod. libertat. Angliæ autoritate parliamenti de Cuttingby*; and ruled by Roll, that there was no direct opposition between them, for that both may stand together; and though *de facto* it is the court of the lord of the manor, yet virtually, and in dignity, it is the king's court.

2 Saund.

291. Gay
and Adams.

If a writ of error be directed *majori & aldermannis civitatis sue B. ac majori & constabulario stapule B. nec non vicecom. ejusdem ac ballivis majori & communitati ejusdem cur. tolf. ac ballivis & communitati cur sue pulverisat. & eorum cuilibet*, to certify the record of a judgment *loquela que fuit coram vobis in cur. nostra civitat. prad. sine brevi nostro, &c.* and the record is certified thus, *viz. Placita in cur. dom. regis tolf. civitat. prad. &c. coram A. & B. tam vicecomitibus com. civitat. prad. quam ballivis, majore & communitate ejusdem civitatis*; this is a good writ of error to remove this record; for though it is not said therein *coram vobis seu aliquibus vestrum*; yet it shall be taken *distributive*, *viz.* the judgment upon a plaint before all the said officers, or any of them.

Roll. Abr.

752. Lewes
and Webb.

(a) It must
always be
directed to
them before

If a writ of error be (a) directed to Sir Edward Littleton (he being then Chief Justice *de Banco*) to certify a judgment *in querelâ que fuit coram vobis & sociis vestris*, where it was before Sir John Finch, then Chief Justice, the predecessor of Sir Edward Littleton, this writ shall abate.

whom the judgment is; *per Godb. 44. Salk. 264-5.*——To him who hath the custody of the record wherein any judgment is given; as of a judgment in the Common Pleas, to the chief justice only; so upon a judgment in the Exchequer, to the treasurer of the Exchequer and barons, to have the record before the chancellor and treasurer of England; though it happen the treasurer of England and of the Exchequer to be the same person. 4 Inst. 105.

Roll. Abr.
752.

So, if a writ of error be directed to Oliver St. John, he being Chief Justice *de Banco* to certify a judgment *in querelâ que fuit coram vobis & sociis vestris*, where it was before Edmund Reeves & sociis suis, there not being then any Chief Justice; this is not good, but the writ shall abate.

Roll. Abr.

752. Clerk
and Sprigg.

But if a writ of error be directed to Peter Pheasant, to certify a judgment *in loquela que fuit coram vobis & sociis vestris*, where it appears by the record, that it was held *coram Edmundo Reeves & Petro Pheasant*; this is a good writ, for though in the return Edmund Reeves is first named; yet this is well enough, in as much as Peter Pheasant is also named; and it does not appear which of them was the eldest.

Roll. Abr.

752. Spye
and Mill.

Style, 191.

203. S. C.

and S. P.

adjudged.

If a writ of error be directed to the mayor, aldermen, and recorder of *Launceston in Cornubiâ*, and the record be certified by the mayor, aldermen, and deputy-recorder, the court being held by letters patent; this is not well certified, in as much as this ought to be certified in the name of the judges of the court; and it does not appear, that the recorder had power to make a deputy by the said letters patent.

Yelv. 3. b.

Lord Crom-

well and

Andrews.

Cro. Eliz.

891.

If an assise is summoned before justices of assise, and they are afterwards removed, and the Chief Justice *de B.* and another justice, are made justices of assise in the same county, and the assise is taken before them, & *propter difficultatem* adjourned in *B.* and judgment

judgment there given for the plaintiff, and a writ of error is directed to the same chief justice before whom the assise passed, reciting the assise summoned before the justices of assise by name, & *postmodum capt.* before the chief justice, &c. but does not recite how the assise came in *B. viz.* by adjournment, or otherwise; this writ of error is not good; for as it took notice of the change of the justices, *a fortiori* it ought to take notice of the adjournment, for by that both judges and court were changed.

But in the (a) 5 E. 6. where judgment in a *quare impedit* by the statute *Westm.* 2. was given by justices of *nisi prius*, and a writ of error thereof brought, without shewing where the judgment was given; it was held good; for the record beginning and remaining in the Common Pleas, it was held not material where the judgment was given; (b) and *Garvy* said, when the record begins in one place, and is finished in another, there, of necessity, in a writ of error the proceedings in both places ought to be mentioned.

quare impedit, for the assise must originally commence before justices of assise, and yet by presumption judgment shall be there given, and not in *B.*, but the *quare impedit* must begin in *B.*, and by indentment judgment shall be there given, though by the statute to avoid a lapse, judgment may be given before justices of assise. 2 Bullst. 171. S. C. and S. P. cited.

If a writ of error be directed to several justices, and returned by part of them only; yet if it (c) truly recite the record, it is thereby removed, and a new writ of error lies *de recordo quod coram nobis residet*.

vary from the writ of error, yet the inferior court ought to remove it.

[Although the return to a writ of error from the Common Pleas be not signed by the chief justice *proprio manu*, yet this is no objection to proceeding on the writ of error.

If a writ of error be directed to *W. W.* chief justice, and the return be only by *W. W.*, without adding "the chief justice within named," yet if there are the words, "*as to me within is commanded*," the return is good, for these words are enough to shew him to be the same person to whom the writ is directed.]

If a writ of error be brought upon a judgment in an assise *capt. coram J. Fleming nuper capitul. justiciar. ad placita* & *J. Dodderidge uno justiciar. ad placita coram nobis tenend. assignat. justiciar. nostris ad assisas*; this writ is naught, for there was no such record before *Fleming justiciar. ad placita*, the words *coram nobis tenend. assignat.* being omitted, and those after *Dodderidge* cannot refer to the first.

If a writ of error be brought *in recordo* & *processu assise*, &c. *inter A. & B. summonit.*, without shewing which was plaintiff and which defendant, it is well enough, because the precedents are both ways.

And now by the 5 G. 1. c. 13. it is enacted, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable."

Noy, 44.
S. C. adjudged.
Godb. 248.
Roll. Rep.
15. S. C. cited.

(a) Dyer, 77.
(b) Lord Cromwell v. Andrews, Cro. El. 891. Yelv. 3. S. C. and a diversity taken between the case of an assise and a *quare im-*

Yelv. 212.
Cro. Jac.
254. Sid.
349. (c) If the record
Vent. 97.

Blackwood v. S. S. Company, Ca. 1063. S. C. temp. Hardw. 344. 2 Str.

Sullivan v. Seagrave, 2 Str. 695.

Cro. Jac.
342. adjudged. cont.
Dodderidge, who said the addition was surplusage.
Godb. 248.
Roll. Rep. 16. 2 Bullst. 164.

Cro. Jac.
341.

[Collins v. Muxworthy, Ca. temp. Hard. 164.]

1 *Ld. Raym.*
71. *P. r.*
Fortescue, J.
1 *Str.* 607.

[A writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the above statute of 5 G. 1. for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. A writ of error was not amendable at common law, because it has in its nature two things, *viz.* a *certiorari* to remove the record, and a commission to examine it; and no court was ever allowed to amend its own commission.]

Sword-blade
Company v.
Dempley,
2 *Str.* 892.
8 *Fitzg.* 201.
S. C. 1 *Barnard* 405.
421. S. C.
So, where
two were
charged with
a joint trespass, and
judgment

An ejectment was brought against the Company and Mr. *Edwards*. After a verdict for the plaintiff, Mr. *Edwards* died, and a writ of error was brought laying the judgment to be *ad grave damnum* of the Company, and of *Mary Edwards* the daughter and heir, and she and the Company jointly assign errors. It was moved to amend the writ and assignment by striking out her name. And upon consideration, the court were of opinion, that it was amendable by the above statute, not only as a variance from the original record, which is really no way to the damage of Mrs. *Edwards*, but also by virtue of the general words *other defects*.

was given against one only, the other being found not guilty, &c., a writ of error was afterwards brought in both their names, on an affidavit that this happened by the mistake of the officer; the court of *B. R.* upon the authority of the above case, ordered the writ to be amended by striking out the name of the person who was acquitted. *Verell v. Rafael*, *Cowp.* 425.

Gardner v.
Merrett,

2 *Str.* 902.
2 *Ld. Raym.*
1587. S. C.
Fitzg. 268.
S. C.

There was a variance between the writ of error and the record; and as it stood in the paper, the court observed it, but neither party would move to amend it, for fear of paying costs; upon which the court said, the above statute would warrant their amending it, which they did without costs.

1 *Barnard* 462. It appears from some of the reports of this case, that no costs are payable upon amendments pursuant to the statute, though at the prayer of the party; but if the prayer be also to amend the assignment of errors, the rule is with costs, because then the party comes for a favour of the court.

Wright v.
Canning,
2 *Str.* 807.
2 *Ld. Raym.*

A writ of error was returnable before any judgment given, and on consideration, it was holden to be such a fault as is not amendable by this statute.]

1531. S. C. 1 *Barnard* 62. 65. S. C. *Rejindoz v. Randolph*, 2 *Str.* 834. S. P. *Vice v. Burrow*, 1 *Ld.* 891. S. P. *Wilson v. Ingoldsby*, 2 *Ld. Raym.* 1179. However, in almost all cases, the writ is sued out before judgment signed, because otherwise execution would issue instantly. *Per Buller, J.* *Jaques v. Nixon*, 1 *Term Rep.* 280.

2. What is necessary to be removed, and herein of removing the Record or a Transcript.

22 *E.* 3. 6.
40 *Ass.* 29.
Roll. Abr.
753.
2 *Str.* 837.

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adverse suit the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases.

Bendl. 51.
Roll. Abr.
752.
Dyer, 89.
Godb. 248.
2 *Roll. Rep.*
235.
F. N. B. 17.

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgment or contract of the parties, and therefore no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of *B. R.* may send for the fine itself, and reverse it, or may send a writ to the treasurer and chamberlain

tain to take it off the file. Besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in *B. R.*

Also, if a writ of error be brought in parliament of a judgment in *B. R.* the chief justice must go in person into the house with the record itself, and a transcript, which is to be examined and left there, and then the record to be brought back again in *B. R.* and if the judgment be affirmed, the court of *B. R.* may proceed on the record to grant execution; and therefore if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could not be any proceedings thereupon to have execution.

of the parliament, to have either the record or transcript.

So, if a writ of error be brought in *B. R.* here, of a judgment in *B. R.* in *Ireland*, the record itself is not sent, but a transcript only, by reason of the danger of the seas; but when it is come safe and entered in the rolls here, then it ceases to be a record in *Ireland*, and is a perfect record here; yet if the judgment be affirmed, the King's Bench in *England* shall not award execution, but shall send a special mandate to the chief justice in *Ireland* to do it.

[It is the very record which comes here out of *Ireland*, and not the transcript of it. And it is no objection, that it should be

the transcript for fear of the peril of the sea; for one might object in the same manner, that upon error in the Common Pleas, the transcript only is removed hither, for fear it should be burnt or lost, before it comes into the King's Bench. But in fact, when the record in both cases arrives here, then it is the true record, and not before; and that which is in *Ireland*, or the Common Pleas, ceaseth to be the record. *Per Holt, C. J.* in *Coot v. Lynch*, 1 *Ld. Raym.* 427.]

If a writ of error be brought in *B. R.* to reverse a judgment given in *B.* the (a) original shall not be removed, if it be not by special matter, as if error assigned in the original.

the command of the writ is to certify *recondam & prosequi*, yet the course is only to certify the declaration and pleas, omitting the writs. *Bldg.* 57. — All is certified which is with the chief justice; but the original and judicial writs remain with the *custos breviarum* and other officers, and are never certified, but where error is assigned for want of them. *Cro. Eliz.* 84. *vide Leon.* 22. *Cro. Jac.* 479. *Roll. Abr.* 790. pl. 6. — The writ is directed to the chief justice, who only certifies the body of the record, which remains with his clerk.

24 *E. 3.* 24. *Roll. Abr.* 753.

(a) Though

If a writ of error be brought in *B. R.* upon a judgment in an inferior court against the plaintiff, there, the court may reverse the judgment, though the original be not removed, no error being assigned in the original; for this is removed but to sue here upon the same original.

17 *Ass.* 5. *Roll. Abr.* 753.

[By the words of the statute of 27 *El. c.* 8., which first gave the writ of error from the court of King's Bench to the Exchequer-chamber, the chief justice is to cause the record to be brought before the judges in the Exchequer-chamber; yet the practice hath always been to send only a transcript, the original record remaining in *B. R.* In the pleadings in *Westby's case*, (3 *C.* 67. a. 70. b.) the entry of the proceedings in error runs thus: "Afterwards, &c. the transcript of the record and proceedings, &c. by a certain writ of the lady the queen of correcting errors, &c. was brought to the justices, &c. in the chamber of the Exchequer aforesaid, according to the form, &c." Yet the subsequent part of the same entry says, "and thereupon the

Dougl. 352. n. 3. *Rutter v. Redstone*, 2 *Str.* 837. *Tully v. Sparkes*, *id.* 869. 2 *Ld. Raym.* 1571.

2 Term
Rep. 737.

2 Saund.
254. Green
and Cole.
Lev. 309.
S. C.

* So, where
a defendant
pleads in
abatement,
a demurrer,
&c. and
judgment of
*respondens
cister*; the
whole of
these proceedings must be entered on record and certified.

"record aforesaid, &c. was sent back, &c." However, as to all legal effects, the record itself is considered to be removed.]

In an action of waste brought in the *hustings* in London, there was a verdict for the plaintiff, which was after quashed for the insufficiency, and a new *venire* awarded, whereupon a verdict was given for the defendant, and judgment for him, and a writ of error being thereupon brought before special commissioners, it was resolved, that the first verdict should be certified in the record, because it was not set aside, for that the jurors had found against evidence, or for any undue practice or misfeasance of the parties, but only for the insufficiency thereof in point of law, which the court had adjudged upon the verdict appearing before them upon record *.

50 Aff. 9.
Roll. Abr.
753.

If a writ of error be brought in *B. R.* upon a fine levied in the *hustings* of Oxford, the record (a) itself shall be removed.

(a) Where upon a writ of error to reverse an outlawry upon an indictment of felony, the record itself, or a transcript only, shall be removed. Bullt. 181.

Vent. 96.
Sid. 466.
Raym. 189.
2 Keb. 684.
Ingoldby v.
Martin,
1 Str. 316.

If there be several records between the same parties with which the description in the writ of error agrees, the inferior court may remove which of the records they please.

[If the writ is "*between A. late of Westminster in the county of Middlesex*," and the record only "*late of Westminster*," if *Middlesex* is in the margin, it is well enough.

Anon.
1 Will. 25.
(b) Good-
right v.
Hugobon,
Ca. temp.
Hardw. 351.

A defendant cannot have leave to transcribe the record (though plaintiff has not done it) in order to *non-pros* the writ, and have the benefit of the recognizance. But (b) if the plaintiff in error is dilatory, the defendant must give a rule to transcribe, and then if he will not, the defendant may *non-pros* the writ of error.]

(E) Of alleging Diminution and granting a *Certiorari*.

F. N. B.
25. a.

IF the judges of the Common Pleas, or other judges, upon a writ of error, will not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record.

Sid. 40.
(c) As Ely.
Sid. 147.

But diminution cannot be alleged upon a writ of error brought upon a judgment (c) in any inferior court.

—The sessions of peace. Sid. 364.—But may in error upon a judgment in Wales and counties palatine. Sid. 147. 364.—So, it may in error upon a judgment before justices of Oyer and Terminer. Sid. 40.

Salk. 266.
Pl. 11.
Hale and
Core.

And therefore where in a borough-court a plaint was entered as the plaint of *A.* and *B.*, and the declaration was by *A. B.*, executor of *J. S.*, and on a writ of error in *B. R.* this variance was assigned for error: The court held, 1. That want of a plaint in an inferior court is the same as want of an original in the court
of

of *Common Pleas*, and that this could not be a plaint in this action. 2. If such variance had been in a record of the *Common Pleas*, diminution might have been alleged, and a good writ certified; but in records out of inferior courts, no diminution can be alleged, and the court must take them as they find them.

A man cannot allege diminution (a) contrary to the record which is certified. Roll. Abr. 764.

to reverse an outlawry upon an indictment for murder, it being assigned for error, that the *exacts* was *ad comitatum*, without saying *meum*, the court, upon the prayer of the attorney general, shewing the king had seized his lands, &c. awarded a *certiorari* to the coroners to certify where the *exacts* was, in order to amend the return. Latch. 210.—Upon a writ of error upon a bill of exceptions, diminution cannot be alleged, for the party must hold himself to the matter in the bill sealed; and if it is not there, it was his folly to omit it, 2 Inst. 427.—Where the record is not rightly certified upon a writ of error upon an outlawry upon an indictment for felony. Bull. 181. but for this *vide* Godb. 267. 2 Roll. Rep. 353. Cro. Jac. 369.

As, if in a writ of error it be certified, that the judgment was *quod defend. sit in misericordia*, the defendant in the writ of error cannot allege diminution: *ff.* That the record is *quod capiatur*, because this is contrary to the record certified. Roll. Abr. 764.

If upon a writ of error the record be certified, that a challenge was to the sheriff for cosenage, and after thereupon a *venire facias* was awarded to the coroner upon diminution, it cannot be certified, that the challenge was after the return of the *venire facias*, because this is contrary to the record before certified, for nothing can be certified but that which stands with the first record. Roll. Abr. 764. Roll. Rep. 200. Floyd and Bechel.

In a writ of error brought in *B. R.*, upon a judgment in the *Common Pleas*, the want of a warrant of attorney being assigned for error, the plaintiff prayed one *certiorari* to the chief justice, and another to the *custos brevium*, both of whom returned *non inveni aliquod warrant.*, and the defendant dying, the plaintiff by journeys accounts brought a new writ of error against the son and heir of the defendant, who appearing alleged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *custos brevium*; and it was urged, the return was not *quod non habetur aliquod warrant.*, but (b) *quod non inveni, &c.*, so that if upon the second a warrant should be returned, it would not be repugnant: but it seemed to *Wray* Chief Justice, that it would be hard to grant a new *certiorari* in this case; but, if any variance could be alleged, it would be otherwise, as adjudged in the case of one *Laffels*, where it was certified there was no warrant of attorney; and afterwards it was moved for another *certiorari* as it is here, and because the original was *inter Laffels executor. testamenti, &c.*, where he was not named executor in the first *certiorari*; upon that matter a new *certiorari* was granted. Leon. 22. Dayrell and Thinn. (b) *Ibid* Cro. Jac. 277. Bull. 21., where upon the first *certiorari* it was returned, there was no warrant of attorney in that term wherein the action was commenced, and another *certiorari* was awarded.

After *in nulla est erratum*, the court, to inform their consciences, may award a *certiorari* to (c) amend the record. Roll. Abr. 764. Style, 352.

2 Roll. Rep. 471. (c) So, they may award a *certiorari* to reverse the judgment. Roll. Abr. 764. Cro. Eliz. 155. 281. 836. 2 Leon. 3. Cro. Jac. 6. 141. 445.

If after *in nullo est erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record there, the court ought to reverse the judgment, if the matter so requires. 5 Co. 37. Roll. Abr. 764.

Roll. Abr.
764-5.
Jon. 139.
S. C. [re-
solved that
the *certio-
rari* was not
well award-
ed; for after
*in nullo est
erratum*
pleaded,
neither the
plaintiff nor
defendant
can allege
diminution;
for by the
joinder they
allow the
record; and

a note is there added, that Bishop's case in 5 Co. does not agree with the record; for there the defendant had not joined *in nullo est erratum*, but did not say any thing, *ideo remanet inde indefensus*. Noy, 83. S. C. held accordingly, but yet the court *ex offi. io* may award a *certiorari ad informandam conscientiam*, and that which is certified shall be annexed to the record, and is called a rider-roll, and says, see 22 E. 4. 46. a. 28 H. 6. 10 Dy. 32. b. 9 E. 4. 32. b. Franklyn v. Reeves, Ca. temp. Hardw. 118. And note in Chapman's case, the difference is, if diminution be alleged in a thing collateral, as warranty of attorney, or any mesne process that is not of the body of the record, it may be alleged after *in nullo est erratum*: but otherwise, if it be of the substance and parts of the record itself; as, if returned in the detinue only, where the first action was in the *debet* and *detinet*, for which see 1 H. 7. 21. which reconciles many differences.]

Roll. Abr.
765. Roror
and Escort.
* And prob-
ably filed
after the
first, and
before the
second *cer-
tiorari*.

In trespass in *B. R.* judgment was given for the plaintiff by default, and a writ of error brought *in camera scaccarii*, and there assigned for error, that there was not any writ of inquiry of damages filed; and upon a writ of *certiorari* it was certified, that there was not any such writ. However, afterwards another *certiorari* was granted, and upon this the writ of inquiry was certified*, upon which the judgment was affirmed.

Roll. Abr.
765. Trevis
and Scott.

So where in a writ of right in *B. R.* after judgment, a writ of error was brought *in camera scaccarii*, and the want of continuances assigned for error; and upon a *certiorari*, the want of continuances certified; yet after, upon another *certiorari*, the continuances were certified, and upon this the judgment affirmed.

Roll. Abr.
765.
Godb. 407.
adjorn.
2 Roll.
Rep. 352.
S. C. but
no judg-
ment. Cro.
Car. 91. Style, 176.

If error be assigned in the original, and upon a *certiorari* granted an erroneous original be returned; and upon this *in nullo est erratum* be pleaded, and after the court *ad informandam conscientiam* grant another *certiorari* for another original; and upon this a good original be certified; the court ought to intend that this is the original, upon which the judgment was given in favour of judgments, which ought to be intended to be good.

3 Leon. 106.
Ray and
Boaly.

In a writ of error, upon a fine, an error was assigned in the proclamations, upon which a *certiorari* went to the *custos breviarum*, and upon his certificate it appeared, that two of the proclamations were made in one day; but it appeared in the Chirograph-office, that the proclamations were duly made; and he making and being the principal officer as to them, and the *custos breviarum* having only an abstract thereof; upon the prayer of the defendant a new *certiorari*

certiorari was directed to the chirographer, who having certified the proclamations duly made, after examination of the clerks of the Common Pleas by the justices in *B. R.* they awarded that the proclamations with the *custos brevium* should be amended according to those in the custody of the chirographer.

If a writ of error is brought upon a judgment in *B. R.* in *Ireland* in a writ of false judgment, upon a judgment in the *Toussel*, (which is the court of the mayor and aldermen of *Dublin*); and it is assigned for error, that there was no plaint entered in the *Toussel*, and that these words *per quod actio accrevit* were omitted in the conclusion of the declaration; if the defendant alleges diminution, yet he shall not have a *certiorari* to the chief justice *de B. R.* in *Ireland*, to certify the residue of the record, &c. and that if any part of the record be not before him, that he should write to the mayor and aldermen to certify it, and that he should certify it to this court; for by this plea of *in nullo est erratum* in *B. R.* in *Ireland*, he hath admitted the record well certified by the mayor and aldermen; and this court hath no authority to require the court of *B. R.* in *Ireland* to write to the mayor, &c. and the judgment *de B. R.* in *Ireland* only is here in question; and such writ being issued, a *superfedeas* was granted to the whole, though it was prayed that the *superfedeas* should be as to the inferior court only: but at another day it being moved, that there might be a *certiorari* as to the words *per quod*, &c. it was granted.

Palm. 285.
Banister and
Kennedy.

In a writ of error in the Exchequer-chamber upon a judgment in *B. R.* it was assigned for error, that in the bill, the plaintiff declared on a lease for three years; but in the plea-roll, upon which the issue was joined, and the record of *nisi prius*, it was upon a lease for five years, so that the bill and declaration vary; and diminution being alleged by the plaintiff, a bill was certified, in which it was only for three years; upon which the defendant had another *certiorari*, and thereupon a bill was certified, wherein he declared upon a lease for five years, which warranted the declaration upon the roll, and the *nisi prius*; and it was held by all the justices and barons, that the second certificate, upon diminution alleged by the defendant, should be received, for that warranting the roll and the record of *nisi prius*, shall be intended the true bill, and the other a fictitious one.

Cro. Car. 91.
between
Howell John
and Tho-
mas.

A writ of error was brought upon a judgment in debt by confession in *C. B.* and the want of an original was assigned for error; the defendant, before a *certiorari* returned, came in *gratis*, and pleaded a release in bar, to which there was a demurrer; and it being agreed that the plea was ill for want of a *venue*, the question was, whether the court *ex officio* might award a *certiorari*? And it was held by three judges, that though the party had (a) concluded himself by relying on his release, yet the court was not bound thereby, but may award a *certiorari*; and if upon the return thereof it appeared that all the proceedings were right, they were obliged to give judgment on the whole record, according to conscience and right: but *Holt* Chief Justice held, that the court in

Salk. 263.
Pl. 15.
3 Salk. 399.
Pl. 3.
Carlton and
Mortgh.
6 Mod. 113.
206. S. C.
2 Ld. Raym.
1005. S. C.
(a) Where
the defend-
ant had con-
cluded him-
self by pleas-
ing, a *reple-*

est erratum, this case could not award a *certiorari*, because the question was yet the court granted a *certiorari* to remove the whole record, a line being omitted in the transcript, on affidavit that the record was right below. Salk. 270. upon a writ of error of a judgment in ejectment in the grand sessions in Wales. [But this the court will do only in order to affirm a judgment, *Berkley v. Howard*, 2 Str. 907. not to reverse it. *Merryfield v. Berrey*, *Id.* 765. *Bowers v. Mann*, *id.* 819.]

Smith v. Stoneard, 2 Ld. Reym. 1156. 1 Salk. 267. S. C. [A writ of error was brought of a judgment in the Common Pleas after a verdict. The plaintiff in error assigned for error want of an original, but did not take out a *certiorari*, as the course is, to get the want of the original certified: the defendant in error pleaded *in nullo est erratum*. It was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were. *Per Holt, C. J.* If the want of an original be assigned for error, and the plaintiff in error do not take out a *certiorari*, and get a return to it, and the want of an original certified; the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari* (a); and if he do not get it done, as is ordered by the rule, the assignment of error stands for nothing. But if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, &c. that is another sort of error; and when the want of an original is assigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

(a) Error for want of an original is not completely assigned, until the certificate is returned. *Sterling v. Tanner*, Com. Rep. 115. Tyfon v. Hilyard, 2 Ld. Raym. 1122. 1 Salk. 269. S. C. If upon error, diminution be alleged for want of original, warrant of attorney, &c. and a *certiorari* be sued out, upon which a record is returned contrary to what is before returned, it cannot be received.

Diimo v. Shirley, Yelv. 108. Booth v. Beard, 1 Keb. 327. Dyke v. Sweeting, 1 Will. 181. Where the want of an original is assigned for error, and it appears that all the proceedings are of the same term wherein the original is returnable, such an original warrants those proceedings, let it be of any return in that term. But an original of the term wherein final judgment is given, will not warrant the proceedings, if by the record it appears that there have been proceedings in the cause, in a term or terms before. The case of original writs differs from that of warrants of attorney; for it is sufficient if a warrant of attorney be filed at any time pending the suit, let it be in which term it will; the stat. of H. 8. only requires a warrant of attorney to be filed in the cause; and the stat. of 4 Ann. requires it to be filed according to the course of the court; and that is to have it filed at any time pending the cause; and it is no matter when, so that it be in the same suit. But as to an original writ, it is otherwise, for if there be proceedings in the action in a term

a term preceding the return thereof, the original will not support them.

The plaintiff in error assigned for error the want of an original, and had a *certiorari* upon which it was certified that there was no original; afterwards the defendant applied to the court of Chancery, and upon affidavit that instructions were given to the curfitor for an original, but that they were lost, that court allowed the original to be supplied. Upon this the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before. It was insisted, that this was irregular, for before the second *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; and the master informed the court, that the course was so, when the second original certified was of another term; but it being in the same term, the motion was not allowed.]

Levin v.
Com. Rep.
118.
1 Ld. Raym.
695. S. C.

(F) Of the *Scire Facias*.

AFTER the record is (a) removed, and the plaintiff in error (b) has assigned his errors, which (c) may be either errors in fact or in law, he shall have a *scire facias ad audiendum errores* against the defendant, who thereupon may plead *in nullo est erratum*, a release, &c.

F. N. B. 20.
(a) Must
assign his
errors, and
sue out a
scire facias
ad audien-

dum errores the same term, or the term next after the record is removed; otherwise the whole matter is discontinued, and he will be obliged to sue a new writ upon the record directed to the justices before whom the record is removed, to proceed upon the record *quod coram vobis residet*. F. N. B. 20 G. But such discontinuance is saved by the defendant's appearing, which he may do *gratis*. Sid. 173. Keb. 642. (b) Must assign his errors before he can have a *scire facias*, &c. F. N. B. 20 E. Vide Roll. Abr. 762. (c) If the matters which are assigned for error appear to the court to be no error, nor colour of error, it will not grant any *scire facias*. 18 H. 6. 18. Roll. Abr. 763. — The usual practice is, that the defendant in the writ of error by consent doth voluntarily take notice of the assignment of errors; and this consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*. Carth. 41. — If he does not, there must be a *scire facias*.

The Exchequer-chamber doth not award a *scire facias ad audiendum errores*, but notice is given to the parties concerned.

Vent. 34.
Vide Palm.
186.

If after a writ of error brought the defendant dies, yet the plaintiff in error may sue out a *scire facias*, &c. against the (d) executor.

Vent. 34.
said by the
secondary
to be so

ruled in the case of Sir H. Thyn. and Corie. — But in Roll. Abr. 763. taken from the Year-book of 9 H. 4. 3. it is said, that if a man be outlawed upon a process at the suit of A. who dies, and he bring error to reverse the outlawry, he shall not sue a *scire facias* against the executor, because he cannot proceed upon this original, which is abated by the death of the testator. Bro. Error, 44. S. C. (d) May be against an administrator generally, or by his particular name. Roll. Rep. 23. 2 Bull. 231.

[If the original plaintiff dies, pending error, his executor may have a *scire facias quare executio non* out of C. B. before the record is transcribed; but afterwards out of B. R. And the plaintiff in error may have a *scire facias ad audiend.* out of B. R. against the executor of defendant in error.]

Wright v.
Trewicke,
Barnes, 432.

If a man condemned in an assise be outlawed for the fine of the king, and he bring a writ of error to reverse the outlawry only, there

7 H. 4. 40.
Roll. Abr.
763.

(a) But if there shall not be any *scire facias* against the recoverer, because the writ of error had been brought of the judgment and outlawry also, it had been otherwise. 7 H. 4. 4. Roll. Ab. 763.

(f) Dyer, 34. pl. 20. Keb. 121. Sid. 316. Hard. 164. (c) 2 Hawk. P. C. c. 50. § 13. (d) 2 Salk. 495. pl. 5. Ld. Raym. 154. 12 Mod. 545. 668.

The attainder of felony of a person who had any lands shall never be reversed by writ of error (b) without a *scire facias* against all the tertenants and lords mediate and immediate. But it is (c) settled, that such *scire facias* is not necessary in the case of high treason. It is (d) said too, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney general confesses it.

8 H. 4. 17. 2 Roll. Abr. 763. Upon a writ of error against the heir of him that recovers, a *scire facias* lies (e) against the heir and tertenants.

(e) Anciently the writ against the tertenants was special, naming them; but of late the course hath been to word the writ generally. Bridg. 72.—The *scire facias* against the tertenants is not *ad audiend. errores*, but *ad audiend. processum & record.* Lev. 72. per cur. Keb. 352.—An attaint lies against him who recovered, and against the tertenant. 2 Bullst. 244. Roll Rep. 37. 302. Bridgm. 72. And the judgment may be reversed against the parties to the judgment and their heirs, though they have nothing in the land.

(f) Leon. 290. Like point in a writ of disceit to annul a fine of ancient demesne lands, and that the tertenant is not bound thereby till, &c. (g) It is the best way to award a *scire facias* against the tertenant, before the court proceeds to the examination of the errors, for he may have something to plead in bar, and so save the court the trouble of examining the errors; and if the judgment should be reversed against the party and privy, yet the plaintiff could not have restitution till a *scire facias*, &c. Dyer, 321.—That such *scire facias* may be granted before or after, at discretion. Hard. 163.

(f) If a writ of error is brought to reverse a common recovery, the court (g) before the reversal thereof, ought to award a *scire facias* against the tertenants; and this is not merely discretionary, but *ex necessitate juris*; for they may have matter to plead in bar as a release, &c. Hil. 2 & 3 Jac. 2. between *Kingston* and *Herbert*, 3 Mod. 119. per cur. but *adjournatur*.—[Sir B. Shower in his report of this case, 2 Show. 490. says, that the court were of opinion, that the awarding of a *scire facias* to the terre-tenants was not *ex necessitate*, but discretionary. And the same is said in argument in *Comberbach's Report*.]

(g) It is the best way to award a *scire facias* against the tertenant, before the court proceeds to the examination of the errors, for he may have something to plead in bar, and so save the court the trouble of examining the errors; and if the judgment should be reversed against the party and privy, yet the plaintiff could not have restitution till a *scire facias*, &c. Dyer, 321.—That such *scire facias* may be granted before or after, at discretion. Hard. 163.

(b) Lev. 72. But this matter was fully debated in the case of (b) *Wynn* and *Lloyd*, where in a writ of error to reverse a judgment given in a common recovery against the vouchee after *in nullo est errat*. pleaded, the court awarded a *scire facias* (upon a surmise of the defendant, that there were tertenants) to the tertenants; the sheriff returned, that *A.* is tertenant, and a *scire feci*, and *A.* comes in and says that there are other tertenants, and prayed a *scire facias* to them, and had it; the sheriff returned, that *B.* is tertenant, and *scire feci*, and *B.* coming in, says there are other tertenants, and prayed a *scire facias* to them. It was insisted, that the tertenant was not a party concerned in the reversal of the judgment, but only as to his possession, and therefore could not otherwise plead than as concerning his possession; that by this means the delay might be infinite, for he that comes in upon this *scire facias* might as well plead that there is another tertenant, and so the plaintiff might be stayed off from ever having the benefit of his writ

writ

writ of error: besides, this surmise is contrary to the return of the sheriff. On the other side it was urged, 1. That the *scire facias* ought to go out against the tertenants, and had in all cases, where it ever was controverted, been awarded, as appears by the (a) books cited in the margin. 2. That it ought to go out against them all, because any one of them may have a release to plead, which may discharge or advantage the other. 3. That if it cannot be pleaded by the tertenant, yet it may be suggested to the court as *amicus curiæ*, and awarded *ex officio*; for it may be, that he who is not summoned, can plead in bar of the writ of error what will go to the whole, and ease the court of examining errors; and in that respect it may be awarded, and the proceedings stay. But the court held, that the awarding of a *scire facias* to the tertenants was not *ex necessitate juris*; and therefore when it is once out, and the tertenants are warned, there is no reason to grant it a third time; that here the delay was apparent; but if he could make it out, that he that is not warned had a release of errors to plead, it being in their breasts and discretion, it should be granted; otherwise not.

But where a writ of error was brought to reverse a common recovery, and a *scire facias* sued out against him that was the nominal demandant in the writ of entry, and a *scire facias* was moved for to the tertenants, but opposed, because the tertenant was an infant, and therefore the parol may demur during her nonage, which would greatly delay the plaintiff; and further, that if the infant should die, the lands may remain to another; notwithstanding this, the court awarded a *scire facias*; and it was held by Holt, C. J. that though the granting of a *scire facias* in such cases against the tertenants is discretionary, and not *stricti juris*, yet it hath been the constant course of this court to grant it; therefore he was of opinion not to depart from that which had been the usual course of the court.

[And upon the authority of those two last cases Lord Mansfield said, that by the established mode of proceeding there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more. But a *scire facias* to the heir is clearly not necessary.

In an information *qui tam*, &c. upon 5 *El.* for using a trade *contra formam statuti*, there was judgment for the plaintiff, on which a writ of error was brought. *Per cur.* In the case of indictments, there needs no *scire facias* for the party to assign his errors, but a rule is sufficient, because the queen is always in court by her attorney-general. But a rule in this case being moved for, the court said, they had ordered precedents to be searched for, but could find none; and therefore the defendant in error must proceed as he could by law.

If a plaintiff below brings error to reverse his own judgment, and does not proceed, the court will make a rule to assign errors in a limited time, or his writ to be non-prossed, for a *scire facias* would here be improper.

Where

(a) Dyer,
321. Cro.
Jac. 392.
Owen, 157.
Bridg. 69.
70. 21 E. 3.
56. Cro.
Car. 295.
313. Moor,
524. Cro.
Eliz. 739.
Co. Ent.
233.

Carth. 111.
Earl of
Pembroke's
case.

Hall v.
Woodcock,
1 Burr.
359. Sheep-
shanks v.
Lucas, *id.*
410.
The Queen
v. Ford, 17.
8 Ann. B.R.
Vin. Abr.
Error, (H. a.)
P. 9.

Johnson
v. Jebb,
3 Burr.
1772.

Fortescue
Allard v.
Mafon,
2 Str. 1258.

Where in error from *Ireland*, the King's Bench affirmed the judgment on a collateral point, it was holden, that the plaintiff could not, on the defendant in error's coming of age, take out a *scire facias ad audiend. errores* in *B. R.* in *England*; for upon the affirmance of the judgment, the record must be remitted to *Ireland*.

Marshall
v. Copey,
2 Str. 917.
Sambidge v.
Housley, 2 Term Rep. 17.

A rule to assign errors was set aside, because given before any rule on the *scire facias quare executio non*. However, these rules may be served together.

Thatcher v.
Stephenfon,
1 Str. 144.

On *scire feci* returned, if the defendant do not appear and join in error, the plaintiff may put it in the paper without taking out a rule to join in error.

Millar v.
Yerroway,
3 Burr.
1723.

A *scire facias* in error need not lie four days in the office before the return.]

Gros v. Nath, 4 Burr. 2439.

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

Roll. Abr.
763. Bro.
Error, 93.
[1 Burr.
410.]
(a) This is
in nature of
a demurrer.

IF the plaintiff in error assigns an error in fact, if the defendant will put in issue the truth of the fact, he ought to rejoin by denial of the fact, and so join issue thereupon, and shall not say (a) *In nullo est erratum*, for by this he acknowledges the fact alleged to be true.

Cro. Jac. 29. Cro. Car. 53. Lev. 311. — It is a confession of an error in fact well assigned. Raym. 231. Lev. 294. but not of a matter assigned contrary to the record. Cro. Jac. 12. 521. Raym. 231.

Roll. Abr.
763.

But when an error in fact is assigned, if the defendant will acknowledge the fact to be so as alleged, and yet that by law this is not error, he ought to rejoin *in nullo est erratum*, for by this he acknowledges the fact, and yet that by law it is not error.

Roll. Abr.
763.

Also if a man who is outlawed brings a writ of error to reverse the outlawry, and assigns his errors, the king's attorney shall not plead *in nullo est erratum*, which amounts to a demurrer, as is done between common persons; but upon the assignment of the error, the court shall give a day to the king's counsel to maintain the outlawry; and it is entered *curia advisari vult* till the outlawry is reversed or affirmed.

Roll. Abr.
763.
[Upon error
in the re-

If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder, for this shall put the matter in the judgment of the court, the record being agreed to be so.

cord, as, want of *capias*, or the like, there, he may say *in nullo est erratum*; and there, though the defendant confess the error, the court ought not to reverse the judgment, till they be assured of the error. Br. Error, pl. 165. cites 7 E. 4. 16.]

Roll. Abr.
764.
Leon. 22.

So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as *quod non habe-*

tur aliquod recordum of resummons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in the writ of error does not pray diminution, and thereupon procure a certificate from the inferior court, that there is not any resummons before the rejoinder entered, this assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered; for if the defendant will confess the error, yet the court ought not to reverse the judgment, till they are ascertained of the error by the record itself.

If a writ of error abates or discontinues by the act and default of (a) the party, a second writ of error shall be no *superfedeas*: otherwise, if it abates or discontinues by (b) the act of God or the law.

writ of error again. Salk. 263. pl. 4. Ld. Raym. 91. 5 Mod. 228. Comb. 393. 12 Mod. 105. Comb. 19. S. P. (b) A writ of error abated by the death of the lord chief justice Foster, and a second writ was sued out and allowed; and it was held a *superfedeas*. Keb. 658. 686. — A writ of error does not abate by the death of the defendant in error; but a *seire facias ad audiendum errores* may be taken out against his executor. Vent. 34. Salk. 264. Secus, if the plaintiff in error dies. Yelv. 208. but for this *vide* Moor, 701. Sid. 419. Carth. 236 and Godb. 68. A diversity where a writ of error shall abate in a real action, though not in a personal action. — Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. Palm. 151. [For if they do not all join, the writ will be quashed, 1 Ld. Raym. But though the writ, in such case be quashed, yet the record is removed by it. 2 Ld. Raym. 1403. 1 Str. 606. Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever. 2 Str. 783. But if one of two persons against whom judgment hath been given, dies after judgment, error may be brought by the survivor without the executor of the other. 1 Str. 234.]

Keb. 658.

(a) As if a plaintiff in error be non-suit, he shall not have a

(H) How far the Writ of Error is a *Superfedeas*.

AFTER a writ of error shewn, the plaintiff ought not to take out execution, but the defendant shall have four days time to get it (c) allowed, and four days time more to put in bail, if the case require it; and if he (d) passes that time, the writ of error shall be no farther a *superfedeas*.

S. P. and that he must not keep the writ in his pocket. (d) That the very sealing of the writ of error is a *superfedeas* to the execution. Mod. 28. *per* Kelynge. [A writ of error is said to be a *superfedeas* from the allowance. Bain. 376. 1 Term. Rep. 279. but as it is the practice to sue out the writ of error before judgment is signed: the courts have said, it shall not operate as an allowance till the judgment is actually signed, and the party shall be allowed four days after the signing of the judgment to put in bail; for before the judgment no bail can possibly justify. As to the service of the allowance, that is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. *Jaques v. Nixon*, 1 Term Rep. 279. *Doe v. Bracebridge*, *ibid.*]

2 Keb. 129.

(c) By the clerk by indorsing a *recept* thereon. Vent. 255. Mod. 112.

Where judgment in a *formeden* was pronounced 16 Novemb. and a writ of error brought by the tenant bearing *teste* 27 Novemb. and then allowed, and *in majorem cautelam* a *superfedeas* made out against executions, and the demandant obtained a writ of seisin, bearing *teste* 9 Octob. before, by warrant of the judgment, which was afterwards entered but as of Octav. Mich. being the last continuance; this being made appear to the court, and they being satisfied that the judgment was pronounced 16 Novemb., before which time the defendant could not have a writ of seisin, nor the plaintiff a writ of error, they held this such a trick as would defeat

Hob. 329. *Clanrickard v. Lisle*, & *vide* 3 Lev. 312.

feat any writ of error: and therefore a new *superfedeas* was awarded against that writ of execution, *quia erroneè*.

Mod. 28.
Hughes and
Underwood.
[See acc.
Laroche
7. Waff-
brough,
2 Term
Rep. 737.]
17. Vent. 97.

If a writ of error is taken out to remove a record between such and such persons, and some of the parties are omitted; so that in strictness the writ does not agree with the record, yet it is notwithstanding a *superfedeas*, and no execution can be taken out, for the court below (a) cannot judge of the fitness of it, though it may be quashed in the court of which it issues.

(a) That if the record vary from the writ of error, yet the inferior court ought to remove it.

Roll. Abr.
491. Lock
and Tillard,
per Croke
and Jones,
cont. the
opinion of
Brampston.
* But the
court, on
motion, will
stay proceed-
ings against
the bail.

If *A.* recovers in debt or damages against *B.* and sues out a *capias ad satisfaciendum* against *B.* which is returned *non est inventus*, upon which a *scire facias* is awarded against the bail and returned, and after a second *scire facias* awarded, but not returned; *B.* brings a writ of error on the principal judgment; this is no *superfedeas* as to the proceedings against the bail, but the second *scire facias* may well be returned, and the plaintiff may proceed thereon, notwithstanding the writ of error, which, affecting only the principal judgment, is distinct from the proceedings against the bail *.

2 Roll.
Abr. 491.

So, if a man recovers against *J. S.*, and on a *scire facias* hath judgment against the bail, and the bail bring a writ of error of the judgment on the *scire facias*; this shall be no *superfedeas* as to the principal judgment, and therefore the plaintiff may take out execution against the principal.

Smith v.
Nicholson,
2 Str. 1186.

[Where a plaintiff, in order to proceed against bail, took out a *capias ad satisfaciendum*, and on the following day a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*, and then waiting till the writ of error was at an end; proceeded by *scire facias* against the bail; the court, on motion, set aside the proceedings; for the ground of them, viz. the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopped all sort of proceedings, and the sheriff could not so much as look after the defendant, in order to found such a return. Besides, it is an invariable rule, that the *capias ad satisfaciendum* shall in no case operate as against the bail until it has lain four days in the office; and though it have lain that time in the office, a writ of error afterwards allowed and served before the day on which the *capias* is returnable, shall have the effect of a *superfedeas* to any proceedings against the bail.]

Perry v.
Campbell,
3 Term
Rep. 390.

2 Roll.
Abr. 491.
Marsh and
Whitestone,
adjudged
per cur.

If a man brings a writ of error on a judgment, but does not remove the record within six days, this shall be no *superfedeas*, but execution may well be taken out, for it appears that the writ of error is merely for delay †.

† *Qu.* If execution can be taken out, whilst the writ of error is in force, and if the defendant in error ought not first to move plaintiff in error. See *post*.

2 Roll.
Abr. 491.
Said and
Saiden,

If upon a *scire facias* on a judgment against *B.*, the sheriff takes the goods of *B.* into his hands; but before any sale of them, *B.* delivers to the sheriff a *superfedeas* on a writ of error, *B.* shall

B. shall have the goods again, for by this seizure no property is altered.

a warrant to his bailiff, and after comes a *superfedeas* to the sheriff, and the bailiff, before notice of it, makes execution, it is not good; for the *superfedeas* to the sheriff determines the warrant of his bailiff. — If execution issues, and the sheriff executes it, and after a *superfedeas* comes to him *quia executio erroneè emanavit*, the sheriff shall have his fees for the execution; *vide tit. Sheriff.*

If a writ of error is brought returnable into the Exchequer-chamber, which is allowed by the clerk of the errors, and a *superfedeas* granted thereupon; but the record is not marked by the clerk of the errors, as the usage is, nor notice thereof given to the attorney of the other side; but these matters are omitted, because the attorney was not known, nor the number-roll of the record; yet this is a good *superfedeas* in law, so that if execution be awarded and executed, it is erroneous, and a *superfedeas* shall be awarded *quia erroneè emanavit*: but it is no contempt in the attorney in taking out execution, he having no notice of the writ of error, and the roll not being marked.

It seems clearly agreed, that an action of debt may be brought upon a judgment in *B. R.*, notwithstanding a writ of error brought in the Exchequer-chamber; for though such a writ of error be a *superfedeas* to the execution, yet the duty remains upon record; and it is but reasonable the party should have this remedy for his damages for forbearance. [But execution cannot be sued out upon the second judgment until the writ of error be determined.]

S. P. adjudged, Draper and Brightwell. Mod. 121. 3 Keb. 129. 239. 316. Vent. 372. S. P. 4 Mod. 247. Dighton and Granvil, S. P. To a *fiere facias quare executionem habet non debet*, a writ of error pending may be pleaded in bar of the execution. Skin. 591. [Benwell v. Black, 3 Term Rep. 645.] * — * Where a writ of error is depending, the court, on motion, will stay proceedings in an action on the judgment, upon terms. The same, if proceedings are against the bail, where error of the principal judgment is depending. [Such a motion, however, cannot be made until the defendant has put in bail to the second action. Smith v. Shepherd, 5 Term Rep. 9. Nor is it merely of course; and therefore the court will not interpose, where the writ of error is obviously for the purpose of delay. Intwistle v. Shepherd, 2 Term Rep. 78. In that case indeed the allowance of the writ of error will not operate as a *superfedeas* to any proceedings. Box v. Bennett, 1 H. Bl. 432. Kempland v. Macaulay, 4 Term Rep. 436. Masterman v. Grant, 5 Term Rep. 714.]

Roll. Abr. 472.
Mich. 1649.
Methwold
and Bawd.
[See Burr.
Rep. 340.]

Supra acc.

10 H. 6. 6.
2 Roll.
Abr. 490.
Dyer, 32.
pl. 5.
Adams and
Tomlinson,
Sid. 236.
Lev. 153.
Keb. 127.
Raym. 100.

(I) To what Court a Writ of Error lies: And herein,

1. Of Writs of Error into Parliament.

THE court of parliament is the supreme court, where anciently causes of great consequence, as between the *magnates regni*, were heard and determined. Hence the House of Lords is the *dernier resort*, to which a writ of error lies; and therefore (a) if a writ of error is brought of a judgment in the King's Bench into the Exchequer-chamber, and there the judgment is reversed; yet a writ of error lies of such judgment into (b) parliament, and the lords may reverse such second judgment.

upon a writ of error, the king may assign certain cards and barons, and with them the justice, to determine the matter. 22 E. 3. 3. Roll. Abr. 280. 2 Bu. R. 164. For the form of the writ, *vide* Show. pl. 12. and for the manner of proceeding therein. *Five miles*, 834. Cro. Jac. 341. Good. 230. Roll. Rep. 14, 15. Noy, 76. Raym. 5. 283.

(a) Show.
Parl. Cases,
24. 110.
Vent. 324.
Raym. 330.
2 Jon. 99.
2 Lev. 232.
(b) When
a record
comes into
parliament

37 H. 6. 13. So, a writ of error lies into parliament upon a judgment given
 11 E. 4. 9. in *B. R.*, either in a cause brought there by writ of error, or ori-
 Roll. Abr. ginally commenced there.

745. for the manner of obtaining and proceeding upon such writ of error, *vide* 4 Inst. 21. Godb. 247. Bulst 162.
 166. Moor, 834. p. 1122. — That a writ of error may be returnable *ad proximam sessionem parliamenti*.
 Dyer, 375. Raft. Ent. 805. — But no *superfedeas* ought to be granted upon a writ of error returnable
ad proximam parliamentum. Vent. 31. Sid 413. — If the parliament is dissolved, the writ of error is
 abated; the court of King's Bench may proceed to execution afterwards without any *remitter*, Carth.
 237. but this is altered by a late order in the Lords house. See ante 133. * — * Writ of error in
 parliament is no *superfedeas*, if it be not transcribed in fourteen days, and the parliament be dissolved.
 Bunb. 64. — If error is brought in parliament, though the house is prorogued, and the record has
 not been transcribed, the court will not on motion grant leave to take out execution. Bunb. 131. —
 If error in parliament is not transcribed in fourteen days, the defendant in error, on motion, shall be at
 liberty to take out execution if it is not transcribed and certified in eight days. Bunb. 69.

(a) Saund. And though upon a judgment in the King's Bench, since the
 346. Carth. 27 *Eliz. c. 8.* the party may elect either to bring a writ of error
 180. S. P. in the Exchequer-chamber, or in parliament; yet if the cause
 † But he commenced in the King's Bench by (a) original writ, there lies
 may on the no writ of error but into parliament. Also, if he elects to bring
 affirmation error into the Exchequer-chamber, regularly, he cannot after bring
 of the judg- error into parliament upon the first judgment †.
 ment, *vide* next case,
 and the stat. *infra*.

Vide 2 Roll. And therefore it seems, that if a writ of error is brought upon a
 Abr. 492. judgment in the Exchequer-chamber, where the judgment is af-
 2 Lev. 232. firmed, and after error is brought upon the same judgment in the
 parliament; this writ of error is no *superfedeas*; but if the writ of
 error is brought upon the judgment in the Exchequer-chamber, it
 is a *superfedeas*.

[By § 12 of the statute of 6 *Ann. c. 26.*, which established a
 court of Exchequer in *Scotland*, a writ of error is given from that
 court to parliament.]

2. Of Writs of Error into the Exchequer-chamber.

As no writ of error lay of a judgment in the King's Bench, but
 in parliament, and as the subjects were often disappointed of their
 writ of error by the not sitting of parliament, or by their being
 employed in publick business when they did sit; therefore,

(b) There- By the 27 *Eliz. c. 8.*, reciting, that erroneous judgments in
 fore this act extends only to such cases in which there is no remedy but in parliament, but not to errors in fact, for these might before have been examined in *B. R.*
 2 Lev. 38. adjudged, Vent. 207,
 208. ad- judged, Cro. Jac. 5.
 B. R. were (b) only to be reformed in parliament, it was enacted,
 " That where judgment should thereafter be given in *B. R.* in
 " (c) (d) debt (e), detinue, covenant, account, case, ejectment, or
 " (f) trespass (g) first commenced there, (b) other than such
 " where the queen shall be party (i), the plaintiff or defendant,
 " against whom such judgment shall be given, may at his elec-
 " tion sue out a writ of error directed to the chief justice, com-
 " manding him to cause the record, and all things concerning
 " the said judgment to be brought before the judges of the Com-
 " mon Pleas and barons of the Exchequer, which being of the
 " degree of the coif, or six of them, shall examine the errors
 " assigned or found, and thereupon reverse or affirm the judg-
 " ment, other than for errors concerning the jurisdiction of the
 " court of King's Bench, or for want of (k) form in any writ, &c.
 " or proceeding, and (l) after the same (m) shall be brought back
 " in

" in *B. R.*, that (*n*) further proceedings may be had thereupon, as well for execution as otherways." foadjudged in *B. R.*

the opinion of the judges in the Exchequer-chamber.—But that errors in fact may be assigned in the Exchequer-chamber, and if denied, tried by *nisi prius*, and how, *vide* *Cro. Eliz.* 731. *Hob.* 5. *Cro. Car.* 514. 1 *Jon.* 410, 411. (*c*) Not replevin, 2 *Roll. Rep.* 434. agreed *per cur.* (*d*) It extends to their heirs, executors, and administrators. *Cro. Eliz.* 294, 295. 6 *Co. So. a.* (*e*) Error lies not upon a judgment in a *fiere facias* against bail. *Yelv.* 157. *Cro. Jac.* 171. *Lancaster and Keyleigh.* *Cro. Car.* 300. adjudged. *Jon.* 325. adjudged.—Yet *Cro. Eliz.* 730. it was adjudged contrary by all the judges and barons except two, for that it was within the intent of the statute, and in nature of an action of debt.—That error lies upon a judgment in a *fiere facias* against executors, upon a judgment in debt, within the equity of the statute. *Cro. Car.* 286. *per curiam dubitatur.*—The *fiere facias* is but to have execution of the former judgment. *Cro. Car.* 464. [A judgment on a *fiere facias* grounded upon one of those actions mentioned in the statute, is in effect a part of the first suit, and the Exchequer-chamber, having cognizance of the original action, hath also cognizance of all its dependencies; *per Hale*, 1 *Mod.* 70. See *Cro. Jac.* 384. *Cro. Car.* 143. *Hob.* 72. 1 *Mod.* 297. 5 *Mod.* 202. 3 *Atk.* 297. Error will clearly not lie in the Exchequer-chamber upon an award of execution in a *fiere facias* only, without including the judgment in the former action. *Bertie v. Clutterbuck*, 2 *Str.* 1102. *Andr.* 287. *Marquis of Powis' case*, 3 *Atk.* 297.]—But *vide* *Cro. Jac.* 384. *Cro. Car.* 143. *Hob.* 72. *Mod.* 297. (*f*) Not rescous, because more than trespass, and trespasses would not have him because the cattle rescued were the cattle of the defendant himself; and there is a writ of rescous in the register distinct from trespass. *Odj and Yate*, *Moor*, 664. pl. 953. by all the justices held clear. *Cro. Jac.* 171. cited. (*g*) It lies not upon any judgment affirmed upon error brought in *B. R.* 2 *Bull.* 162., nor upon a judgment in a *fiere facias* upon such judgment affirmed in *B. R.* *Roll. Rep.* 203. *Salk.* 263. pl. 4. *S. P.* adjudged.—Nor upon a suit by original. *Saund.* 346. *Cartl.* 180. *S. P.* admitted. [*Per de Dougl.* 352. note.] (*h*) It lies in debt upon the statute of usury. *Sid.* 240. said to have been adjudged.—But whether it lies in debt upon the statute of usury, *Sid.* 240. *dubitatur*, and *vide* *Vent.* 49. [It is now settled that it does. *Lloyd v. Skutt.* *Dougl.* 350.] It lies in debt *galant*, upon the statute for absenting from church, for the king is not properly party, though to have part of the penalty. *Raym.* 275. adjudged. (*i*) Not in an action of *foedatum magistratus*, *Lord Say and Seal v. Stephens.* *Jon.* 194. adjudged by three judges against *ore. Ley*, 82. adjudged. *Cro. Car.* 142. *Earl of Stamford and Needham.* *Sid.* 143. *Vent.* 49. (*k*) *Sid.* 253. (*l*) So, if the plaintiff in error be non-suit, or the suit be discontinued. *And.* 144. 2 *And.* 123. (*m*) So that no execution can be granted out of the Exchequer-chamber. *Style*, 233. (*n*) Where after reversal and judgment *quod respondet*, and the record remanded, a writ of inquiry may be awarded, *Sec. Follis and Ridge.* *Cro. Jac.* 266. *Noy*, 129. *Yelv.* 74.

And by the said act it is further enacted, " That such reversal or affirmation shall not be final, but the party grieved may bring error in parliament."

3. Of reversing Judgments in the Court of Exchequer.

Before the statute of 31 *E. 3. c. 12.* (*a*) errors in the Exchequer were sometimes examined in (*b*) parliament, and sometimes before commissioners, by force of the king's writ under the great seal. 4 *InA.* 72. *Moor*, 566. (*a*) Writs of error upon judgments were there seldom brought. *Siv.* 51. (*b*) *Roll. Rep.* 14, 15.

By that statute, in all cases touching the (*c*) king, or other person, upon complaint of error in process in the Exchequer, the (*d*) chancellor and (*e*) treasurer shall (*f*) cause the record to be brought before them, and taking to them the judges* and other sage persons, shall call before them the barons to hear the cause of their judgment; and, if upon examination, error be found, shall amend the rolls, and send them into the Exchequer to have execution. (*c*) The king may have error here. *Yelv.* *Mod.* *Co.* 42. *a.* 2 *Co.* 1. (*d*) By 31 *Edz.* *c. 1.* the not coming of the Lord

chancellor or lord treasurer, or either of them, at any day of adjournment, shall be no discontinuance, as one of them, or both chief justices come, and are present.—But this statute not providing remedy where they came not at the return of the writ of error, *vide* 2 *Leon.* 59. it was enacted by 6 *Car. 2. c. 2.* that if the chief justices, or either of them, or the chancellor or treasurer shall not come at the return of the writ of error, it shall be no abatement or discontinuance; but no judgment shall be given, unless both chancellor and treasurer shall be present. (*e*) Intended of the treasurer of England; and at the time of

making this statute, the offices of treasurer of England and of the Exchequer were in several hands. (f) Though the barons only are judges, yet the treasurer together with them hath the custody of the records, and therefore the writ of error is to be directed to him and the barons, and it is, though the lord treasurer and treasurer of the Exchequer are the same person. 4 Inst. 105. Sav. 35, 36. —* If the chancellor and treasurer do not call in the other justices it seems to be error. 8 H. 7. 13.

Carth. 388.
*Vide the
 Banker's
 case.*

In the *banker's case* adjudged in the Exchequer, which came before the lord keeper, &c. pursuant to the above statute, the lord chancellor and three of the judges were of opinion, that the judgment of the Exchequer should be reversed; and then the question was, whether the judgment of the court should pursue the opinion of the majority of the judges, or that of the lord keeper and the three judges? and three of the judges were of opinion, that the majority of the judges should govern this judgment; but the others being of a contrary opinion, the judgment was reversed, which was pronounced by my Lord Keeper *Somers*.

Rex v.
 Cotton,
 2 Vez. 298.
 Parker, 142.

[A writ of error from a judgment in the court of Exchequer issued returnable in the Exchequer-chamber, pending which the plaintiff in error died; whereby the writ abated. Lord Chancellor *Hardwicke*, and the two Chief Justices *Lee* and *Willes*, were of opinion, that the new writ could not be properly to the Exchequer-chamber, because the record did not reside with them, and the words of the writ are *record. quod coram vobis residet*; for only a transcript of the record is sent into the Exchequer-chamber, and the record itself remains in the court of Exchequer. But the court made a rule for a *remittitur* to be entered on the record, together with a suggestion of the death.]

4. Of Writs of Error into the King's Bench.

(a) 34 Aff. 7.
 37 Aff. 5.
 Roll. Abr.
 745.
 F. N. B. 22.
 but for
 this *vide*
 4 Inst. 356.

The court of King's Bench superintends the proceedings of all other inferior courts, and being the king's own court in which he formerly sat in person, by the plenitude of its power corrects the errors of those courts. Hence it is, that (a) a writ of error lies in this court of a judgment given in the (b) King's Bench in (c) *Ireland*.

land.
 Keilw. 202. 5 Co. 18. a. Calvin's case, Leon. 55. Yelv. 118. Style, 386. Vaugh. 290. 402. and per Roll. Rep. 17. it is said, per Coke, that Ireland was annexed to the crown of England by conquest, and therefore, &c.; but 2 Bulst. 163.—It lies not in the parliament of Ireland. Roll. Rep. 17. per Coke. (b) Upon a judgment in *Banco* there, it must be brought in *Banco Regis* here, &c. F. N. B. 22. Yelv. 118. [But now by stat. 23 Geo. 3. c. 28. § 2. no writ of error or appeal from the courts in Ireland shall be received or adjudged in any court in this kingdom.] (c) Upon a judgment in Calais, when under the subjection of the king of England, a writ of error lay in B. R. 4 Inst. 282. Raym. 174. S. P. cited. Vaugh. 290. 402. S. P. cited; but yet *vide* Keilw. 202. S. P. cont.—But it lies not upon any judgment in Scotland, because a distinct kingdom, and governed by distinct laws. Show. Par. Cases, 33.

Roll. Abr.
 747-5.
 Roll. Rep.
 287.
 29 Aff. 47.
 4 Inst. 50.

So, a writ of error will lie of a judgment given in Chancery on the common law side, called the *petty-bag*, as upon a *scire facias* upon a recognizance, although both courts were before the king himself, and to (d) some purposes are the same.

Dyer, 315. & *vide* Moor, 570. pl. 778. (d) As if issue be joined in Chancery, it must be tried in the King's Bench, and the record delivered over *per proprias manus* of the chancellor. 2 Saund. 23. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. Jefferson and Dawson. [No traces of any writ of error being actually brought from the common law side of the court of Chancery into B. R. are to be met with later than the fourteenth year of Queen Elizabeth, A. D. 1572. Dy. 315. And Lord Keeper North

North in 1682 declared, that no such writ of error lay, that the books were founded only on the single opinion of Lord Dyer in the above case, and that he would grant injunctions against them. 1 Vern. 131. 1 Eq. Caf. Abr. 129. This opinion of the Lord Keeper, Sir W. Blackstone says, seems not to have been well considered. However, there are respectable authorities in confirmation of it. Lamb. Archion. 69. The opinion of Mr. Justice Choke, Yearl. 37 H. 6. 13. b. and 11 E. 4. 9. a. Bro. tit. Error, pl. 95. At the same time it must be acknowledged, that the learned commentator cites authorities equally respectable in opposition to it. 18 E. 3. 25. 27 Aff. 24. 29 Aff. 47.]

If a peer be attainted before the lord high steward, a writ of error lies in the King's Bench of such attainder, and the party has no other remedy*.

Sid. 208.
Lev. 149.
per Twissden.
* Error lies

in parliament, upon an attainder for treason; for though the stat. 33 H. 8. 20. says, that judgment of attainder by common law, shall be of as good force, as if done by authority of parliament, this shall be intended of a lawful attainder. Hale's Hist. Pow. and Jurisd. of Parliament, 19. 4 Inst. 21.

A writ of error lies of a judgment in the Common Pleas into the King's Bench, which only can correct the errors of that court, and from thence into parliament. 4 Inst. 22.

A writ of error lies into the King's Bench of a judgment in a county palatine, for though these are superior courts and have *jura regalia*, yet their jurisdiction is derived from the crown. 4 Inst. 214. 225. Roll. Abr. 745.

If an erroneous judgment be given in *Durham* in the Chancery, upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bishop himself, and if he gives an erroneous judgment, error lies in *B. R.* 4 Inst. 218.

If the justice in eyre gives an erroneous judgment at a justice-feat in a forest, a writ of error lies thereupon in *B. R.* 4 Inst. 297.

By the 34 & 35 H. 8. c. 26. § 113. Errors in judgment in pleas real and (a) mixt, before the justices in their great sessions in *Wales*, shall be redressed by error in *B. R.* in *England*; but errors in pleas personal shall be reformed before the (b) president and council.

(a) In ejectment, Griffith's case, Moor, 248. pl. 591. adjudged. Cro. Eliz. 104.

adjudged. (b) This court is dissolved by the statute of 1 W. & M. stat. 1. c. 27., and by the same act, errors in pleas personal are to be redressed as errors in pleas real and mixed were by 34 & 35 H. 8. c. 26.

5. Of Writs of Error into the Common Pleas and Inferior Courts.

If an erroneous judgment be given in (c) *London*, or other place, which is a court of record, the party grieved shall have a writ of error, and this writ may be returned into the Common Pleas, or into the *King's Bench*, at the pleasure of him who sueth the same.

F. N. B. 44.
(c) Though error lies not in *B. R.* upon a judgment

given in *London*, yet it lies upon a judgment given at Newgate, which is upon commission in their sessions. 2 Leon. 107. so held, and vide 2 Roll. Rep. 97. 2 Lev. 223.† If error be of a judgment in the sheriff's court in *London*, it shall be, before the mayor and sheriffs in the hustings. 4 Inst. 248. F. N. B. 22. (H) Vide Priv. Lond. 164. 168.

No writ of error lies in *Banco* or *Banco Regis*, upon a judgment given within the five ports; but by custom such judgment is examinable by bill in nature of a writ of error *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*.

4 Inst. 224.
See the courts of Cinque Ports.

If a judgment be given in the court of Stannaries of the duchy *Cornwall*, (d) no writ of error lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be an appeal

Roll. Abr. 745. l. 20.
(d) That is, for any mat-

ters touch- to the guardian of the Stannaries, and from him to the prince;
ing the and when there is no prince, to the king's council.
Stannaries,
otherways, upon a judgment there given upon collateral matters. 3 Bulst. 183. *per* Coke, Chief Justice,
said to have been so resolved upon a conference by all the judges, as is seen recorded in Chancery in the
petty-bag office. Q. Owen, 8. Sid. 233.

Roll. Abr. A writ of error lies in the *Common Pleas* upon a judgment given
745. before the judges of assize.
but *vide*
Leen. 55. 3 Leon. 159. Dyer, 250. Moor, 78. And. 12. N. Bendl. 153. Cro. Eliz. 26. Carter, 222.

18 E. 3. 14. Upon a judgment given in the *Hustings* in *London*, a writ of error
Roll. Abr. lies at *St. Martin's* before certain justices.

745.
Lev. 309. 2 Saund. 253. S. P. and that upon a judgment of the said justices, a writ of error lies in
parliament, *vide* 2 Leon. 107. It lies not from the courts of the city of London to B. R. though it does
lie thither, from all other corporation courts. 2 Burr. Rep. 777. — An appeal lies to the house of
peers from a decree in the mayor's court. See the case of Littlebury and Buckley, *post*, tit. Evidence (G).
[In the case of Harrison v. Evans, 6 Br. P. C. 181. on a judgment in the sheriff's court in London, a
writ of error was returnable in the court of Hustings there, and on the judgment of that court, a special
commission of errors was directed to five of the twelve judges, or any two of them, upon whose judgment
a writ of error was brought returnable in parliament.]

6. Where a Writ of Error lies in the same Court in which the Record is.

F. N. B. 21. If upon a judgment in *B. R.* there be error in (a) the process,
Poph. 181. or through the default of the clerks, it shall be reversed in the
Roll. Abr. same court by writ of error sued there before the same justices.
746.

(a) And therefore the 27 Eliz. c. 8. which gives a writ of error into the Exchequer-chamber, extends
not to errors in fact, for these might have been examined in *B. R.* 2 Lev. 38. Vent. 207. Cro.
Jac. 5. S. P. adjudged.

3 Inst. 214. So, if one is indicted of treason or felony in *B. R.* or, being in-
dicted elsewhere, the indictment is removed in *B. R.* and by pro-
cess of that court he is erroneously outlawed, and so returned; a
writ of error may be brought in *B. R.* for the reversal thereof.

Sid. 208. Also, if an erroneous judgment in point of law be given in
Cornhill's *B. R.*, upon an indictment in *London*, a writ of error may be
case, ad- brought in the same court; for though in civil cases error does
judged. not lie in the same court, unless for a matter of fact; yet in
Lev. 149. criminal cases it lies as well for an error in law as fact.
S. C. ad-
judged, and
said, though it may be brought in parliament, that does not prove but it may be brought here also. — But
according to 1 Sid. 208. it seems that this was only for error in fact. And Q. If it could be for error
in law? And see *infra*.

(b) Fitz. In (b) *Fitz. N. B.* it is said, that a judgment cannot the same
N. B. 21. term it is given be reversed in *B. R.*, without a writ of error,
(c) Moor, though such judgment may in the *Common Pleas*. But it does
186. pl. not seem that there is any foundation for this distinction, (c) for
332. during the term, in which any judicial act is done, the record
Yelv. 157. remains in the breast of the judges of the court; and therefore
Poph. 181. the roll is alterable during the term, as they shall direct*.
But when
the term is
past, the
roll is the record, and admits of no alteration. Co. Lit. 260. a. *vide* tit. Amendment, 108. — * An
erroneous judgment may be stayed, by moving in arrest of judgment, within four days.

But if an erroneous judgment be given, and the error lies in the judgment itself, and not in the (a) process, a writ of error does not lie in *B. R.* of such judgment.

court awards an exigent where they ought to award a *pluries capias*. Roll. Abr. 746.—They may reverse their own judgment for false *Latin*, because this is not the default of the court, but of the clerks. 7 H. 6. 30. Roll. Abr. 746. —Where by reason of fraud, &c. a judgment may be vacated after the term in which entered, *vide* 2 Roll. Abr. 724. —If judgment be given in an action in *B. R.* and there also execution be awarded, a writ of error *quod coram vobis residet* does not lie in *B. R.* in *ad-judicatione executionis*. Roll. Abr. 746-7. Roll. Rep. 65. S. C.

If two bring a writ of error in *B. R.*, upon a judgment in an assize, and pending the writ one of the plaintiffs dies, and after, the court, not knowing of the death of one of them, reverses the judgment; and after he, against whom the judgment was reversed, brings a writ of error in the same court of *B. R.*, and assigns the death of one of the plaintiffs in the first writ of error, which was the act of God, not the error of the court, it seems the writ well lies.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for insufficiency is quashed in the King's Bench, the plaintiff in error may have a new writ *coram vobis residet*, but such new writ is not a *superfedeas* in itself as the first writ was, and therefore he must move the court for a *superfedeas*, and put in bail thereon.

If error is quashed, error *coram vobis* lies; *scilicet*, where the record is never removed, as is the case where the writ is quashed for variance between the writ and the record. *Ginger v. Cooper*, 1 Str. 607. 2 Ld. Raym. 1403.]

So, if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of error *coram vobis residet*, as also a *superfedeas* on putting in bail; for such second writ being void is as if there had been none before.

[Error *coram vobis* does not lie in the King's Bench after error brought in the Exchequer-chamber, and the judgment affirmed; for before the statute of *Eliz.* the King's Bench could not examine its own errors in fact after an affirmance in parliament; and the Exchequer-chamber is now in the same degree with regard to the King's Bench in those cases within the statute, as the parliament was before.

Error *coram vobis* lies not in the Exchequer-chamber.]

(K) Of assigning Errors: And herein,

I. Of the Manner of assigning Errors.

UPON a writ of error for want of (b) assigning errors, judgment is not affirmed, (c) but execution goes upon the first judgment, so that the party can have no costs; but his remedy must be upon the recognizance, by which he is bound to prosecute with effect.

assigned in a record which is not in the court where the writ of error is brought. 11 H. 4. 47. b. Roll. Abr. 760. 769.—Assignment of error is in the place of a declaration. 9 E. 4. 32.—Error may be assigned in every part of the record. Roll. Abr. 760. —May be moved to the court, though not particularly

particularly assigned. 5 Co. 37. b. Error in fact or in law may be assigned on a judgment by default. Roll. Abr. 756. Style, 112. (c) If a record be removed out of the Common Pleas into the King's Bench by writ of error, and the plaintiff will not assign his error, then a *scire facias* shall issue forth *quare executionem habere non debet*; and, upon summons and two *nibils* returned, the plaintiff shall have execution. 2 Leon. 107. [But a *scire facias*, it seems, cannot issue till the transcript of the record below is removed; and therefore the defendant in error, if the plaintiff is dilatory, must give a rule to transcribe; and if the plaintiff will not do it, he may then *non pros* the writ of error. Ca. temp. Hardw. 351.]

Carth. 40,
41. *per*
Holt, C. J.
where the
errors were
assigned in
a private
manner
without
giving no-
tice to the
defendant in error.

The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; wherefore if the plaintiff in error delay to sue forth his *scire facias ad audiendum errores*, the defendant hath no other way to compel him, but by suing out a *scire facias quare executionem non, &c.* and if, upon such *scire facias*, the plaintiff in error doth not plead, that his errors are assigned, but suffers judgment to pass upon two *nibils*, no errors afterwards assigned shall prevent execution.

And by a rule of the court of King's Bench, if the plaintiff in error doth not assign his errors, and give a copy of them to the defendant's attorney in error, by or before the time given by the rule on the *scire facias* is out, the defendant's attorney in error may enter judgment on the *scire facias*, and take out execution thereon, but can have no costs, unless he gives a rule for the plaintiff to assign error on record; which if he doth not do, he may be nonprossed, and then the defendant in error shall have his costs.

Also, by another rule of the same court, when the plaintiff in error hath assigned the general errors, he must give a copy of them to the defendant's attorney, who may plead *in nullo est erratum* to it immediately, and enter both on the roll, paying the plaintiff's attorney 2s. 4d. for the same.

Yelv. 6, 7. If the defendant in error sues out a *scire facias quare executionem non debet*; this is merely collateral to the record removed, and yet by matter *ex post facto* may become a record; as, if the plaintiff upon the return of the *scire facias* appears, and pleads a release, or other matter, as he well may, then this is a record annexed to the first record removed; but if upon the return of the *scire facias*, the plaintiff appears, and assigns errors, or hath a day given him to assign them, and upon this record assigns his errors insufficiently; this *scire facias* is but a piece of paper filed to the record, no proceedings being thereupon.

6 E. 4. 6. In a writ of error it is no good assignment of error, *quod in omnibus erratum est*; for the court is not bound to inquire of the errors, if the party does not shew them.

Roll. Abr. 761. Bro. Attaint, 86. 2 Leon. 22. In a writ of error to reverse an (a) outlawry, errors cannot be assigned by attorney, but the party must appear in person.

Cro. Eliz. 611. S. P. Wade & Use v. Smith, where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed, & vide Carth. 7. S. P. where a difference was taken, that where the error appears on the face of the record it may be assigned *per attornatum*, but no opinion given thereon. (a) A person attainted of treason or felony, before he can have a writ of error to reverse the attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50. § 11.—And no such writ of error is to be allowed without an express warrant from the king, or the consent of the attorney-general. Sid. 69. Bull. 71. 3 Mod. 42. Roll. Rep. 175.

[A de-

[A defendant convicted for a misdemeanour, and in execution for the fine, may, with leave of the court, assign errors by attorney.] Rev v. Stapleton, 1 Str. 443.

If two bring several writs of error, and several *scire facias*'s to reverse a judgment in an assise against them, they may assign errors jointly. 11 H. 4. 62. b. E. 2. Error, 50. Roll. Abr. 761. S. C.

If a writ of error upon a judgment in an assise be brought by four, and only one appear, and the others make default, he cannot assign errors alone, till the others are summoned and seivered. Yelv. 3, 4. Cromwell and Andrews.
 Cro. Eliz. 891. S. C. adjudged. [In such case, he must move the court for time to assign his errors, till the others can be summoned and seivered. Fiescobaldi v. Kinafton, Str. 783.]

So, if upon a judgment in a *quare impedit*, a writ of error be brought by the bishop and incumbent, the incumbent only without summons and seiverance, cannot assign errors. Cro. Jac. 94. Lancaster and Law, adjudged.

If two are outlawed in an appeal of murder, and they bring a writ of error to reverse it, and one appears, but the other does not, he shall not assign errors till the other does; because he hath joined with him in the writ of error. Sid. 316. The King and Tothill, adjudged; but vide 2 Roll. Rep. 490.

Two brought a writ of error, and made two attorneys; upon the *scire facias*, the one attorney assigned error, to which the defendant took issue, and then the other would plead in abatement of the writ: it was held *per Cur.*, if one of the plaintiffs had made default, he should be seivered; but if they go on, they must proceed jointly; and if one attorney will assign error, &c. without authority from both, we cannot help him, let him take his remedy against the attorney. 6 Mod. 40. Shepherd and Bailly v. Orchard. Lev. 146.

[A writ of error cannot be nonprossed without a rule to assign errors. But where neither plaintiff in error nor his attorney could be found so as to be served with the rule, the court of K. B. ordered, that fixing the rule up in the King's Bench office shall be good notice.] Leith v. McFarlan, 3 Burr. 1772. Thomson v. Baker, Ca. temp. Hardw. 130.

2. Of assigning Errors in Fact and in Law.

The plaintiff in error cannot assign error in (a) fact and error in law together; for these are distinct things, and require (b) different trials. Roll. Abr. 761. Sid. 147. Leon. 105.

(a) As that he was, under age when he levied a fine. Raym. 231. Vent. 252.—That was a feme covert. Roll. Abr. 761. (b) *Viz.* Matters of fact to be tried by a jury, those of law, i. e. those appearing on the face of the record, by the judge before whom the record is removed. The plaintiff of law, i. e. Yelv. 58.

[And as error in fact and error in law cannot be assigned on one writ; so, after affirmance on error in law assigned, error *coram vobis*, and error in fact assigned; shall not be allowed.] Burleigh v. Harris, 2 Str. 175.

If the plaintiff in error assigns error in fact and error in law, which are not assignable together, and the defendant in error pleads *in nullo est erratum*; this is a confession of the error in fact, and the judgment must be reversed; for he should have (c) demurred for the duplicity. Style, 69. Lev. 6. Salk. 268. pl. 15. 270. pl. 18. 3 Salk. 399. pl. 3.

6 Mod. 113. 206. 2 Ld. Raym. 1005. (c) Where the errors assigned were, 1. That the declaration was *minus sufficiens in lege*. 2. That judgment was given for the plaintiff, when it should have been for the

the defendant. 3. That the plaintiff in the action died before the verdict given; and though it was agreed, that this assignment of matter of fact and matter of law was double, and would have been ill on a general demurrer; yet the court held, that the advantage thereof was now lost by pleading *in nullo est erratum*. Carth. 338, 339. Edmonds and Probert.

Sid. 93. Also, if an error in fact be well assigned, *in nullo est erratum* is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country.

Cro. Jac. 12. But if an error in fact be ill assigned, *in nullo est erratum* is no confession of it; as (a) if it be assigned, that such an one at the time of the return of the *venire* was not sheriff, and the record be removed into *B. R.* by *certiorari*, there, *in nullo est erratum* is no confession of that error, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in records*.

Yelv. 58. So, if the plaintiff in error assigns an error in fact, viz. that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though the defendant in error pleads *in nullo est erratum*, yet it shall not amount to a confession, but shall be taken only for a demurrer.

King v. Geisler and Shire. [This case is not law; where error in fact is assigned, the plaintiff must conclude with an *avowment*, in order to give an opportunity of trying the fact by the country, if the defendant in error chooses it. Sheepshanks v. Lucas, 1 Burr. 412. Carth. 567.

Cro. Car. 12. Also, if an error in fact that is not assignable be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that at such a day there was no court of Common Pleas sitting; because that is against the record; and in such case *in nullo est erratum* is only a demurrer. So, if a man say he did not appear, and the record say, he did, *in nullo est erratum* is no confession, but a demurrer, because it is (b) against the record.

Lev. 76. (b) if a man appear and plead as a prisoner: *in custodia marcesb.* he cannot after assign for error, that he was not *in custodia marcesb.* Cro. Jac. 568. Hob. 264. Roll. Abr. 762.

Cro. Eliz. After errors assigned, and a release pleaded by the defendant, the plaintiff discontinued; and because there was manifest error in part of the record remaining in *B.* he obtained a writ out of Chancery to the chief justice to remove the residue of the record, which being removed in *B. R.*, he would assign errors upon a new part removed: it was ruled *per Cur.*, that inasmuch as the first writ was discontinued, and this a new writ, the plaintiff is not tied to the former errors, but may shew others at his pleasure; for it is now as if none were assigned before, and he may assign other errors out of the record; and the removing of the record in this manner was held allowable. But this being entered upon another roll, it was held a mis-entry, and the plaintiff was put to a new writ of error.

3. Of assigning that for Error which appears contrary to the Record.

Roll. Abr. It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice,

justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Hence it is, that in a writ of error to reverse a fine, the plaintiff cannot assign, that the conusor died before the teste of the *dedimus*, because that (a) contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued.

ter the conusance taken, and before the certificate thereof returned, the conusor died, because this is consistent with the record. Roll. Abr. 757. Vide head of Fines and Recoveries.

A conusance of a fine was taken before *R. M.*, one of the justices of the Common Pleas, and after, in the prosecution of the fine, the *dedimus* was directed to Sir *R. M.*, he being after the conusance made a knight, who returned the *dedimus* with his name and title; and this was assigned for error, that the person who took the conusance was not the same who was impowered to take it; but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir *R. M.*, and that Sir *R. M.* by virtue thereof took the conusance.

If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgesses of *A.* by custom, it cannot be assigned for error, that there is no such custom, for this is contrary to the record, and even what the writ of error itself supposes, viz. that they have a court.

and *per totam curiam*, this assignment being against the record, it is not receivable; wherefore the judgment was affirmed.

If, upon diminution alleged, the plaintiff in error procures an original to be certified, and the defendant furnishes there is a good original; and upon a new *certiorari* granted that is certified, the plaintiff in error cannot assign that the proceedings were upon the first writ, for that is contrary to the record; for when there is a good writ to warrant the proceedings, a man shall never be admitted to say the proceedings were upon the bad writ.

If the defendant appears by *John Green*, his attorney, it cannot be assigned for error, that the said *John Green* was dead before the day of appearance, because that is against the record.

upon a writ of error in the Exchequer-chamber. [Nor can it be alleged that the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. *Plummer v. Webb*, 2 Ld. Raym. 1415.]

In a writ of error upon a judgment in the Palace Court held *coram Jacobo Duce Ormond*, it cannot be assigned for error, that the duke was not there, because that is contrary to the record, though in fact the court was held before his deputy, according to the patent.

In a writ of error upon a judgment in an inferior court, it may be assigned for error, that the mayor, who was the judge, had not received the sacrament, and taken the oaths, according to the

Dyer, 89.
Roll. Abr.
757. Cro.
Liz. 39.
(a) But the
plaintiff in
error may
say, that af-

Yelv. 33.
Arundel and
Arundel.
Cro. Eliz.
677. S. C.
Roll. Abr.
757. Cro.
Jac. 11, 12.
3 Mod. 141.
S. C. cited.

2 Bulst. 243.
Whitler
and Lee,
adjudged.
Roll. Rep.
53. S. C.
Cro. Jac.
359. S. C.

Cro. Jac.
597. Johns
and Bowen.
Palm. 428.

Cro. Car. 53.
Morris and
Fletcher,
adjudged.

upon a writ of error in the Exchequer-chamber. [Nor can it be alleged that the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. *Plummer v. Webb*, 2 Ld. Raym. 1415.]

Lev. 76.
Molins and
Wheatly.
Sid. 94.
Kepp. 355.
S. C. ad-
judged.

2 Lev. 184.
Kipply and
Tuck.
2 Jon. 81.

S. C. adjudged *per Cur. præter Wild.* 3 Kcb. 606. 665. 721. S. C. adjudged *nisi*; but *vide* 2 Lev. 242. 2 Jon. 137. S. P. adjudged *cont.* 25 Car. c. 2., because his office is made void, and so the proceedings *coram non iudice*.

Baker v. Thompson, Ca. temp. Hardw. 166. [Where in the description of the justices of assize, *A. & B. just.*, &c. *ad capiend. iuxta formam*, &c. the word *assizes* was omitted; yet, as it appeared from other parts of the record, that they were justices of assize, the court held, that this could not be assigned for error, inasmuch as it would be contradictory to the record.

1 Roll. Abr. 758. pl. 8. If *A. B.* is sworn upon the principal panel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error that the *A. B.* first sworn, and *A. B.* the tales-man were one and the same person, so as to make it a trial by eleven jurors only; for this is contrary to the record, which says, that they who were sworn on the *tales* were *alii de circumstantibus*; he could not be *idem* consistently with the record, which says, that he was *alius*; and therefore such an averment, contrary to the record, shall not be admitted.

Helbut v. Held, 2 Str. 684. 2 Ld. Raym. 1414. So, it shall not be assigned for error, that *A. B.*, who was sworn as a juror, returned upon the principal pannel, was never returned by the sheriff: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem*, it says, *jurata inter partes præd. ponitur in respectu* till the next term, *nisi prius* the justices come, &c.; at which time they come, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff,) viz. *A. B. venit et in juratam illam juratus existit*; so that the record expressly says, that the *A. B.* who was sworn, was one of them who was returned by the sheriff, and therefore the error assigned is contrary to the record.

Bradburn v. Taylor, 1 Wils. 85. So, as being contrary to the record, it shall not be assigned for error, that the defendant filed his warrant to defend by *A. B.* his attorney, and that it appears on the judgment that he appeared and defended by *C. D.* his attorney.

Goodright v. Wright, 1 Str. 25. A defendant in ejectment cannot assign for error, that being an infant, he appeared by attorney.]

4. Of assigning that for Error which is for the Party's Advantage.

5 Co. 39. It seems agreed, as a general rule, that a man cannot reverse a judgment for error, unless he can shew that the error was to his (a) disadvantage. (a) And therefore a man cannot assign error in process, or delay, which is for his own advantage. F. N. B. 21. 8 Co. 59.— But a man may assign the want of a warrant of attorney of his own attorney, though it be his own default. 1 H. 4. 44. Roll. Abr. 760.

5 Co. 39. b. Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it; for it would be trifling with the courts of justice, and unreasonable to defeat the estate which he accepted by the fine.

5 Co. 39. b. Moor, 74. For the same reason, the conusor cannot assign any error in the grant and render; because by that the estate which passed from him by his conusance is restored to him, and therefore he shall not be admitted

admitted to defeat the estate which by his own agreement he accepted.

But if the error be the default of the court, though it be for the advantage of the party, yet the party that hath the benefit by it may assign it for error, for the course of the court ought to be observed.

As, if in action of debt it is found, that the defendant owes the plaintiff 5 *l.*, and the jury assesses damages to 2 *d.* and costs 2 *d.*, and after judgment is given, that the plaintiff shall recover *debitum & damna prædict.* to 2 *d.*, and no judgment is given for the costs, though this is for the advantage of the defendant, yet he may assign it for error, because this is the error of the court to alter the manner of judgments.

So, if the plaintiff in a suit retracts, by which judgment is given against him, but he is not amerced as he ought; though this is for his own advantage, yet for that the amercement ought to be parcel of the judgment, and so the judgment is not perfect without it, he may assign it for error.

So, in every case, where a judgment is given against a man, in which he ought to be amerced, if he be not amerced, he may assign it for error, though it be for his own advantage.

this will be aided by the statute of jeofails, *vide tit.* Amendment and Jeofail.

So, if a man be amerced by the judgment, where he ought to be fined; though this be for his advantage, yet he may assign it for error; for the form of the judgment, which is the act of the court, is altered by it.

but for this *vide* Cro. Eliz. 65. 107. Poph. 203. 2 Saund. 47. and tit. Amendment and Jeofail.

[So, if one defendant only be charged with the whole of the damages and costs, this may be alleged for error by the other defendant not charged; for this is an error in the final judgment, it is the fault of the court.]

2 Str. 971. 2 Barnard. 357. 386. 441.

But if in a writ of annuity, the issue be found for the plaintiff, and no damages found for him, and judgment be given according to the verdict; the defendant cannot assign it for error, that no damages were taxed against him, because this is for his advantage; and here the defect is not in the judgment, as it is where it is a *capiatur* for a *misericordia*, but in the verdict.

11 Co. 56. a. S. C. adjudged; by which books it appears, that the plaintiff before judgment released his damages, and had judgment for the annuity only, which made it more clear; and so it is in Roll. Abr. 784. S. C.

Upon an issue between a peer of the realm and another, if the *venire facias* be *quod summoneat 12 liberos & legales homines*, and do not say, *tam milites, quam alios*, as the register is, (a) though the peer of the realm may assign it for error, yet the other cannot, because it does not concern him.

error of the court may be assigned for error. *Vide* 2 Saund. 253.

In

2 Saund. 45.
Williams
Gwyn, ad-
judged.
3 Keb. 450.
553. 605.
S. C.

In a writ of error brought by the tenant, it cannot be assigned for error, that the court awarded a *grand cape*, where they ought to have given judgment for the defendant to recover, because the award of the *grand cape* was only in delay of the demandant, and not to the prejudice of the tenant, and therefore not by him to be alleged for error, because not *ad grave damnum tenentis*.

5. Where the Matter assigned for Error is aided by the Appearance of the Party, and not being taken Advantage of in proper Time.

Carth. 124.
laid down
by Holt as a
general rule.
Salk. 2. S. P.

A man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time of taking that exception.

Carth. 124.

As, if a feme covert bring an action in her own name, *per attornatum*, and the defendant plead in bar to the action, he shall never afterwards assign the coverture for error.

Roll. Abr.
781. Smith
and Ody-
ham.

So, if a feme sole brings trespass and recovers, and a writ of inquiry of damages is awarded; and before the return thereof, the plaintiff takes husband; and after the writ is returned, and judgment given thereupon, without any exceptions taken by the defendant; he shall not have advantage of this in a writ of error, because the writ was only abateable by plea.

3 H. 6. 9.
Roll. Abr.
779, 780.
(a) Where
an error in
process is
helped by
appearance,
Latch. 118.

Also, if there be an (a) omission of any writ or process, or one writ awarded in lieu of another; yet if the judgment is not given thereupon, but after the party appears and pleads to issue, and judgment is given upon the verdict; this is not erroneous, because he had not taken advantage of this before pleading to issue.

vide Cro. Eliz. 83. 167. Style, 237. Vent. 220. 249. Cro. Jac. 414. Bull. 143. Cro. Car. 351.

Roll. Abr.
780. Ha-
vert and
Gibbons.

If a man in *B.* brings a bill upon his privilege, but hath no writ of attachment of privilege; yet if the defendant after appears and pleads, this shall be helped by the appearance.

Roll. Abr. 205. S. C. adjudged. 3 Bull. 61. S. C.

Roll. Abr.
780. John-
son's case,
Cro. Jac.
609.

If a man be indicted, and no addition be given to him as there ought, yet if the defendant appear and plead to issue, and this be found against him, it is helped, for the addition is ordained by the statute, that the party who may happen to be outlawed ought to have notice of it; and here he hath notice, and *constat de personâ* by the appearance.

2 Roll. Rep.
225. S. C.
adjudged.
Cro. Eliz.
582. Tho-
rowgood
and Sewys,
adjudged.

A *capias* was directed to the sheriff of *B.*, and it was returned by one who was not sheriff, and this was held a manifest error: but because the defendant had appeared after and pleaded, it was held not material.

Roll. Abr.
781. Lord
Powis and
Kirtman.

If upon a trial between a peer and a common person, the sheriff does not return a knight, as he ought, yet if the array is not challenged for this, the peer cannot take advantage of it afterwards;

wards; for this is a privilege only which the law gives him, and which he may waive if he please.

[This challenge is taken away by 24 Geo. 2. c. 18. § 4.]

So, if the sheriff who returns the panel in an assise was brother to him for whom the assise passed; yet if the party does not challenge the array, it is no error.

If a verdict be quashable for the misbehaviour of the jury, as for the receiving evidence of one part, after departure from the bar, which was not given in evidence at the bar; if this be not shewn in arrest of judgment, no advantage can be taken there-of in a writ of error, for this shall not be examined after judgment.

The writ was in debt for 40*l.*, and the *capias* and all the process to the return of the *pluries capias* accordingly, and then the entry was, that *querens obtulit se in placito* 40*s.*, and upon the default of the defendant an exigent was awarded; and the defendant after appeared and pleaded, and confessed the action; and this was held no error, being helped by the appearance; for as an appearance saves defaults in mesne process, so it saves the fault of the (a) continuance by an *obtulit se*.

If a writ be brought to the damage of 40*l.*, and the plaintiff declares *ad damnum* 200*l.*, and the verdict gives 30*l.*, this is no error after verdict, for the writ is (b) not abated *de facto*, but only abateable by plea.

the writ is *de facto* a nullity and destroyed, so that judgment thereupon would be erroneous, there the writ is *de facto* abated; as if an action be brought against a feme covert as sole, this makes another man's property liable, without giving him an opportunity of defending himself, which would be contrary to common justice; and therefore the writ is *de facto* abated, for which *vide* Cro. Eliz. 121. 185. 193. 330. Coult. 106. 2 Leon. 162. 3 Leon. 93. Roll. Rep. 176. Palm. 311. Hob. 57. 162. 279. 281. Godd. 11. Style, 477. Yelv. 56. 3 Co. 85. a. Vaugh. 95.—So, if the return of a *pluries* is laid to be after the beginning of a term, and the *memorandum* of the bill is entered generally of that term; this makes the writ a perfect nullity, for, by the plaintiff's own shewing, he had no cause of action at the time when the action was brought. Carth. 172.—And in these cases, which are more than matters in form, the party may move in arrest of judgment, or have advantage of them by writ of error. Jon. 304. Cro. Jac. 654. Cro. Eliz. 722.

If upon an *audita querela* a *scire facias* be brought bearing date before the *audita querela*, and the defendant appear, and for this cause demur; this fault is cured by the appearance, for the *audita querela* is more of the nature of a commission than a writ; and if the party be in court, the matter ought to be inquired into, without inquiring into the nature of the process by which he was brought in. in the nature of mesne process, to bring in the party to answer.

But a *scire facias* upon a judgment differs, and a fault therein will not be cured by appearance.

this is the foundation, and *quasi* an original; and if an original should bear date on a Sunday, or other like defect be therein, it would not be helped by appearance.

If a *quare impedit* be brought against the bishop and incumbent only, without naming the patron, though this might have been pleaded in abatement; yet if the defendant plead in bar, &c. it cannot after, upon a writ of error, be assigned for error; for though the want of the patron's being made a defendant might make

3 H. 4. 6.
Roll. Abr.
782.

Roll. Abr.
783-4.
Cro. Eliz.
616.

Cro. Jac.
311. Love-
lace and
Juniper.
(a) Style,
209. Swift
and Notr.
Keb. 641.
Sid. 773.
Cro. Eliz.
367.

Palm. 270.
(b) Here the
general rule
to be ob-
served is,
that where

Sid. 406.
Vaughan
and Lloyd.
Vent. 7.
S. C. ad-
judged, the
scire facias
being only
2 Keb. 461.

Sid. 406.
Vent. 7.
S. P. For

Cro. Jac.
651. Sir
George
Savil and
Thornton.
Palm. 306.
311. S. C.

adjudged.
2 Roll. Rep.
239. S. C.
adjudged.
Salk. 4.
pl. 10.
See too tit.
Abatement
(K), vol. 1.
19.

Roll. Abr.
781. 791.
Markham
and Sir
Francis
Fortescue.
Roll. Rep.
450. S. C.
adjudged.
Roll. Abr.
782.

make the writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for error concerning the writ, but what actually abates it.

So, though it be a good plea for a defendant to say, that a stranger is tenant in common with the plaintiff; yet if he does not plead it in abatement, he shall not have advantage of it in arrest of judgment.

If an action be brought against Sir *Francis Fortescue*, knight and baronet, and he appear, and plead to issue, and a verdict and judgment be given for the plaintiff, the defendant in a writ of error shall not assign for error, that he was a knight of the *Bath*, and ought to be so named, for he has lost this advantage by appearing to the other name, and thereby concluded himself.

If an alien brings a real action as heir to *J. S.* against another, and recovers, the defendant cannot assign for error, that he was an alien born, inasmuch as he did not take this exception at first, as he should have done.

For this *vide*
2 Hawk.
P. C. c. 27.
§ 107, 8, 9,
10. c. 35.
§ 8.

Although a person acquitted on an erroneous indictment or appeal may be tried again, and cannot plead, that he was acquitted, because his life was never in danger on such erroneous indictment or appeal; yet if the error were in the process only, the acquittal may be pleaded to a second indictment or appeal, because such error is saved by the appearance.

Leon. 189.
302. Knight
and Savage.
(a) Yelv.
158. Roll.
Rep. 338.
and Salk.
266. pl. 11.
that the want of a plaint is the same as the want of an original in the Common Pleas, which may be certified on alleging diminution; but in records out of inferior courts no diminution can be alleged, but the court must take them as they find them. (b) Cro. Jac. 108.—And that the court of King's Bench is to take notice of the particular laws and customs of the place where judgment was given. Salk. 269. pl. 17.

If a judgment be given in an inferior court and no (a) plaint entered, this is error, and not aided by the appearance of the party; and therefore, where by the record it appeared, that the defendant (b) *summonitus fuit*, where the first entry ought to be *A. B. queritur versus C. D. &c.*, judgment was reversed for this reason.

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6. Where Matters which might have been assigned for Error are aided by a Release, and the Consent of Parties.

10 Co. 115.
Pillrid's
case. Where
the plaintiff
may release
damages for

If the plaintiff recovers more damages than he has declared for, as if he declares for 40*l.* and the jury give him 49*l.*, though (c) this be error, yet if before judgment he releases the overplus, he may take judgment for the 40*l.*

part, and take judgment for the rest, *vide* F. N. B. 107. Moor, 281. Leon. 92. 2 Bullst. 280. Brownl. 235. Style, 364. Hard. 58. (c) If a man brings a plaint in an inferior court, and in the declaration sets forth particular demands, which over-run the sum mentioned in such plaint, though never so little, and the jury give a verdict according to the sums mentioned in the declaration, this is erroneous; for the plaint is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment are for more than is contained in the writ or plaint, though beyond it never so little, by the same reason they may go to larger sums *in infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court; but in such case the plaintiff may remit the overplus. Yelv. 5. Noy, 44. 2 Saund. 286.

Also, where the jury find greater damages than the party declared of, the court may, to prevent error, give judgment for so much as the party declared for, *nullo habito respectu* to the rest, as well as the party may release the overplus, and take judgment for the rest.

the court permitted the plaintiff to enter a *remittur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. *Pickwood v. Wright*, 1 H. Bl. 643.]

Yelv. 45.
[And where for this cause, a writ of error was brought,

In an *ejectione firmæ*, if part of the things declared for be well demanded, and others not, and the plaintiff have a verdict for the whole, and entire damages given, he may release all the damages in that which is not well demanded, and pray judgment for the residue; and this helps the error, if judgment be given accordingly.

Roll. Abr. 786. Clive and Vere. Cro. Car. 458.

As in an *ejectione custodie terræ & heredis*, if a verdict be given for the plaintiff, the issue being upon the tenure, and entire damages given and costs, the plaintiff may relinquish the damages and costs, and have judgment of the ejectment of the land only, for that such writ does not lie for the body.

Roll. Abr. 784. 786. Clifford's case. Dyer, 369. Cro. Jac. 102. S. C. cited;

5 Co. 108. and 10 Co. 130.

So, in an *ejectione firmæ de uno tenemento*, and several acres of land, upon not guilty pleaded, if a verdict be given for the plaintiff, and entire damages found where the action does not lie for the tenement, for the uncertainty the plaintiff may relinquish his damages and have judgment for the lands only, without error.

Roll. Abr. 784. 786. Rhetorick and Chappel. 2 Bulst. 28. S. C. Cro. Jac. 146. P. adjudged.

Cro. Eliz. 119. 3 Leon. 128. Style, 30. S. P.

In a writ of debt for 100*l.* against an executor, if the plaintiff counts upon an obligation for 99*l.*, and upon a *mutuatus* by the testator for 20*s.*, and upon the issue, the jury find for the plaintiff in the whole, and assess damages entire, where it appeared no action lay against the executor upon the *mutuatus* of the testator; yet if the plaintiff releases the 20*s.* and all the damages, and hath judgment for the residue, this judgment is not erroneous.

Roll. Abr. 764. Ashford's case. 2 Saund. 286. Like point debated.

In a *quare impedit*, if the jury give damages and costs, where no costs ought to be given, for that the statute did not give them, and after judgment is entered *quod nullo habito respectu* of the costs, the court awards that he shall recover the damages, this special entry, without any release of the costs, shall help the error.

2 Roll. Abr. 784. Grange and Denny. Roll. Abr. 363. 3 Bulst. 174. S. C. adjudged.

If a bill of debt be brought against an attorney upon three several obligations, and upon demand of *oyer*, it appear by the condition of one of the obligations, that the day of payment thereof is not yet come; after a verdict for the plaintiff, upon conditions performed pleaded, and costs and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come, yet, upon his release of costs and damages, he shall have judgment for the other obligations.

Hob. 178. Roll. Abr. 785. S. C. Saund. 286. S. C. cited.

If in debt upon the statute of usury it is laid in the writ, that he *corruptive* let 40*l.* &c. and that he lent 20*l.* &c. but it is not said *corruptive*, and the defendant pleads *nihil debet*, and it is found against

Cro. Jac. 104. Woody's case.

against him, the plaintiff shall have judgment as to the 40*l.*: and in this case it was said, that if the defendant had demurred, the plaintiff should have had judgment for this part.

Raym. 395. If in trespass the plaintiff declares for taking the mare of the plaintiff and several goods, but does not say of the plaintiff, and thereupon the defendant demurs, the plaintiff may have judgment for the mare, and release the action for the rest.

Roll. Abr. 785. Barber and Pomrey, adjudged; cont. Justice Jermin. Style, 175. S. C. 2 Saund. 286. Like point upon demurrer debated, but no judgment given; & vide All. 29. In an action of debt for 10*l.*, if the plaintiff declares upon a lease for years, rendering rent at certain feasts, and concludes *quia* 10*l.* of the said rent, for such a time ending at such a feast, &c. he brought this action, where it appears by the declaration, that there was 4*s.* wanting of the 10*l.*, so that the rent in arrear amounted but to 9*l.* 16*s.* and thereupon the defendant pleads *nihil debet*, and upon this there is a verdict for the plaintiff, and damages and costs given; though the demand be entire, *scilicet* of 10*l.*, and it appear by the plaintiff's own shewing, that he had no cause of action for the whole; yet the plaintiff may release the 4*s.* and damages, and take judgment for the rest.

Roll. Abr. 785. Washman and Rowe. If in trespass for an assault, battery, and taking his corn, the defendant justifies as to the battery in defence of his corn, upon which there is a demurrer, and pleads not guilty as to the corn, upon which issue is joined, and found for the plaintiff, and damages taxed thereupon; the plaintiff may relinquish the demurrer, and pray judgment on the verdict, and this will not be error.

Roll. Abr. 785. Starr and Cuckow. (a) For this vide 2 Roll. Abr. 100. In trespass for a battery against two, if one pleads not guilty, and the other pleads a special plea; and upon this a demurrer by the plaintiff, and it is adjudged for the plaintiff, (a) he may relinquish his action against the other, and have his writ to inquire of the damages against him.

Roll. Abr. 785. Brown and Stephens. In an action of trespass, if there be three issues joined, *scilicet*, one, not guilty to part; the second, upon a prescription for common; the third, whether the beasts *raptim commorderunt* in going to take the common; and the jury find the first issue for the plaintiff, and the second issue for the defendant; but did not inquire of the third issue; the plaintiff relinquishing the third issue may pray judgment for the first issue, and this shall prevent any error.

Co. Lit. 125. a. If a *venire facias* be awarded to the coroners, where it ought to be to the sheriff, or the *visne* come out of a wrong place, if it be *per* (b) *assensum partium*, and so entered of record, it will stand good.

Co. Lit. 125. a. (b) If by consent the defendant on a *cessi corpus* appears by attorney, this is no error. 21 E. 4. 77. b. Roll. Abr. 787. — So, if the defendant appears by attorney upon the exigent by consent, this is not error. 7 H. 6. 21. Roll. Abr. 787. for the rule therein is *consensus tollit errorem*, for which vide several cases in 5 Co. 40. 2 Roll. Rep. 21. Godb. 428. Noy, 107.

(c) 44 E. 3. 6. 24 Aff. 4. Upon the rule of *consensus tollit errorem*, it hath been (c) adjudged, that an action in its own nature local may, by the (d) consent of parties, be tried in a different county: so, (e) if it be doubtful in which of two counties the action did arise, it may be tried

tried by a jury from both counties; and this being done by assent can be no error. Palm. 100. Raym. 372. 2 Jon. 199.

(d) But the consent must be entered on record, otherwise it is error; for which *vide* Hob. 5. Roll. Abr. 787. Bulst. 216. Cro. Eliz. 664. Hob. 266. 5 Co. 40. Dyer, 284. Sid. 339. (e) 7 H. 6. 21. Roll. Abr. 787. S. C.

[A party who has agreed under a consolidation-rule not to bring a writ of error, is precluded from bringing one, though there be manifest error on the record. Camden v. Edie, 1 H. Bl. 21.

Executors against whom a *scire facias* is sued out to recover damages assessed on an interlocutory judgment against their testator in his lifetime, cannot bring error, if the testator's attorney agreed for him, that no writ of error should be brought in *that action*.] Executors of Wright, Bart. v. Nutt, 1 Term Rep. 388.

(L) What Defence the Defendant in Error may make: And herein of pleading a Release.

THE defendant in error may plead (a) a release of all errors, or a release of all (b) suits; and these pleas, if found for him, will for ever bar the plaintiff in error. (a) 9 H. 6. 48. Roll. Abr. 788. [And a re-

lease of errors in the same instrument with the warrant of attorney, and dated the term in which judgment was entered, is good. London v. Pickering, 2 Str. 1215.] — The defendant in pleading a release, must lay a *venue*. — But though it be ill pleaded, yet if there are not errors, the judgment will be affirmed. Salk. 268. pl. 15. 270. pl. 18. 3 Salk. 399. pl. 3. 6 Mod. 113. 206. 2 Ld. Raym. 1005. (b) Latch. 110. Cole's case resolved *per cur*.

So, where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar. Co. Lit. 228. b. 8 Co. 152. Roll. Abr. 788. 2 Roll. Abr. 405.

Also, if a man loses in a real action, and he releases all his right to the land, this shall bar him of his writ of error, for no person that is not entitled to the land, &c. can bring a writ of error to reverse a judgment; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears. 9 H. 6. 46. Roll. Abr. 747. 788. Dyer, 90. a. 3 Lev. 36. Hutchinson's case.

Hence it is, that if a man releases all his right to the land of which a fine was levied, he has thereby barred himself of his writ of error; for his release having for ever excluded him from the land, he can have no writ of error, because no body is entitled who cannot have the land of which the fine was erroneously levied. Cro. Eliz. 469. Roll. Abr. 789.

So it is, if a fine be levied of 120 acres of land, and he that has right to a writ of error make a (c) feoffment of the whole, he shall never reverse the fine: but if the feoffment had been made, or a release had been given of twenty acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because

the Mayor
of Wick-
ham.

cause he has not transferred his right as to those, and therefore may be reinstated if the fine be erroneous.

(c) A lease for years of the land is a suspension of the writ of error for the time. Lev. 72. *per cur.* Keb. 320. Bridgm. 57. — But a feoffment is an extinguishment thereof. Lev. 72. *per cur.* & vide Goub. 26. 4 Leon. 135. 221. Palm. 247. Co. 112. Bridg. 57.

Roll. Abr.
788. Hart's
case. Noy,
59. S. C.
and there
said the fine
was not
pleaded, be-
cause not
engrossed,
and the engrossing was said on purpose by the conusee.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage after inspection is recorded by the court, but, before the fine reversed, he levies another fine to another; this second fine shall hinder him from reversing the first, because the second having entirely debarred him of any right to the land, must also deprive him of all remedies which would restore him to the land.

Roll. Abr.
788. Car-
rington's
case. Cro.
Eliz. 151.
2 Leon. 211.
Moor, 366.
Roll. Rep.
306.
Bridg. 77.

But if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second fine; for though there be error in the second, yet till that appears judicially to the court, it must be looked upon as a fine duly levied, and consequently a bar to the plaintiff, because while the second stands in force, he cannot have the land. But if in this case the plaintiff brings another writ of error to reverse the second, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error that the second fine was erroneous, and upon the second writ that the first fine was erroneous, and so be relieved against both, for here the examination of both fines comes judicially before the court; and if there appears any error, the court will set them aside, and not suffer them to stand in the way of the plaintiff's right.

2 Jon. 181.
Cockman
and Farrer.
Raym. 461.
Vent. 353.
2 Sid. 92.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine now endeavoured to be reversed, and five years in bar of the writ of error, any more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei cujus petitur dissolutio*.

2 Inst. 518.
2 Bulst. 244.
Cro. Jac.
333. Roll.
Rep. 36.
Raym. 462.
Jon. 181.

So, if a fine be levied of land in ancient demesne, the lord may reverse it after five years expired; but if a second fine had been levied, the lord should be barred of his writ of disceit after five years from the second fine; for a fine of ancient demesne is not originally within the courts of *Westminster*, and the statute in relation to the bar does not extend their jurisdiction; but when a fine is levied of ancient demesne, it comes within the conusance of the king's courts till the fine be reversed, and by consequence, they have a jurisdiction of it, and so the fine becomes a bar.

11 H. 4. 6.
94. Roll.
Abr. 788.
(a) Where
a man is
outlawed in
a personal
action by process upon the original, and brings error; a release of actions personal is no bar, because he

If a man (a) outlawed upon a *redisseisin* releases all actions to the recoverer, yet he may have a writ of error of the outlawry, because that this does not belong to the party, but to the king in interest, and he may assign error in the judgment of the *redisseisin* to reverse the outlawry.

is

is to be restored to nothing against the plaintiff, though when by the outlawry he forfeited all his goods to the king, he shall be restored to them and to the law, so as to be of ability to sue. Co. Lit. 288. b. 8 Co. 152. a.

If the tenant, pending a *præcipe* against him, aliens in fee, and (a) after, judgment is given against him, and he brings a writ of error; this feoffment is not any bar to the writ, because he was privy to the judgment after. Roll. Abr. 788. Bridg. 77. Roll. Rep. 306. (a) So, if the tenant, pending a *præcipe* against him, aliens in fee, and repurchases for life, and after judgment is given against him, he shall have a writ of error, and his feoffment is no bar. Roll. Abr. 748. 788. — So, after his death his heir shall have a writ of error, because of the privy. Roll. Abr. 788.

In a writ of error to reverse a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entered into part, for before the possession was taken from him, he might have error to reverse the judgment, though not to have restitution. Lev. 72. Winn and Lloyd.

In a *scire facias* against a tertenant, he may plead a release of error, though he be not privy to the judgment. 9 H. 6. 48. Bro. 9. S.C.

But the tertenants cannot plead (b) in abatement of the writ of error, but only in bar as a release, &c. in maintenance of their title. Lev. 72. [1 Burr. 362.] (b) Where

a *scire facias* is awarded generally against the tertenants, without naming them, and several are returned warned, and appear, one may plead non-tenure to discharge himself, though not to abate the writ as to the rest; as might be done, if all were named in the writ, for which vide Holland and Jackson. Cro. Eliz. 739. Palm. 123. 227.

In a writ of error against the heir of the recoverer within age, and a *scire facias* against the tertenants; if the parol demurs for the heir, and the judgment is reversed against the tertenant; yet at full age the heir may plead the release of the demandant of the right, or of the errors, and bar him. 9 H. 6. 48. Roll. Abr. 766.

[By stat. 10 & 11 W. 3. c. 14. a writ of error for the reversing of any fine, recovery, or judgment, must be commenced, or brought and prosecuted within twenty years after such fine levied, recovery suffered, or judgment signed or entered of record.

Although it should appear on the record that the judgment is above twenty years standing, yet cannot the defendant have the benefit of this statute without pleading it, because there is a saving of rights of the persons mentioned in the act, as infancy, &c. which may be replied to take off the effect of the plea; and therefore the court cannot take notice of it merely as it appears upon the record itself. And this plea, as well as the plea of a release of errors, must conclude with praying that the plaintiff may be barred of his writ of error, not that the judgment be affirmed, for they admit the judgment to be erroneous.] Street v. Hopkinson, Ca. temp. Hardw. 345. 2 Str. 1055. S. C. Ibid. 1 Str. 127. 2 Str. 683. 1 Sho. Rep. 50.

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. Where, on the Writ of Error, Part only, or the whole Judgment, shall be reversed.

(a) For this *vide* Moor, 366. Noy, 117. 2 Leon. 178. Cro. Eliz. 425. 2 Sid. 57. 94. 2 Roll. Rep. 136. Sid. 357. 2 Jon. 374. Carth. 235. (b) Ellis and Wallis, Roll. Rep. 2. 2 Bulst. 214. Allen, 74. Roll. Abr. 774. S. C.

A Judgment being an entire thing (a), cannot regularly be reversed for part, and affirmed for part; as (b) in a *formeden de uno crofto*, messuage, &c. if the demandant recovers, and in a writ of error it is adjudged, that a *formeden* does not lie of a *croft*, the judgment for the residue shall be reversed also, because the writ is not good, in as much as there cannot be a good judgment upon a bad writ.

Roll. Abr. 775. *vide* Allen, 43. Yelv. 209. (c) But *vide* 17 Car. 2. c. 8. by which it is enacted, that in all actions real, personal, or mixed, the death of either party between the verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after the verdict, & *vide* Sid. 385. —* And the stat. 3 & 9 W. 3. c. 11. § 7. the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit, and suggesting the death, it cannot be alleged for error.*

So, in an action of trespass against three, if one dies (c) pending the writ, and yet judgment is given against all three, in a writ of error upon this judgment, the whole judgment shall be reversed, because it is entire, though the writ by the death abates but against one.

Roll. Abr. 775-6. Eltonhead and Decernan. Allen, 74. S. C. cited. Vent. 27. 2 Keb. 506. 545. Like point; but for this *vide* 16 & 17 Car. 2. c. 8. where this is aided, tit. Amendment and Jeofail. —† *Copiatum pro fine*, taken away, and other provisions in lieu thereof. 5 W. & M. c. 12.

In an action of debt upon a bill, and upon a contract upon an *emisset*, if the defendant pleads *non est factum* as to the bill, and *nil debet* as to the contract, and both are found by verdict against the defendant, and judgment against the defendant *quod capiatur* † for denying his deed; and it is not also *quod sit in misericordia* as to the contract, as it ought to be, and entire damages given, and a writ of error is brought; for this the whole judgment shall be reversed, *scilicet*, as well the judgment upon the bill as for the contract.

Roll. Abr. 776. Bird and Orms. Cro. Jac. 289. S. C. and S. P. adjudged. Allen, 74, 75. S. C. cited, and S. P. adjudged. Style, 121. 125. 406. S. P. adjudged.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all.

Roll. Abr. 776. Hayward and Williams, adjudged.

If an action be brought against *A.* as a feme sole, where she is covert, and against *B.* and *C.*, and they all plead to issue, and *A.* as a feme sole, and judgment is given against them all accordingly; in this case the baron of *A.* with *A. B.* and *C.* may join in error, and assign for error the coverture of *A.*, and thereupon the judgment shall be reversed for all, because it is entire.

If there is debt for rent on two several demises, and on the first the demise and reservation are laid right; but as to the second, the demise is with a reservation of rent *secundum ratam* 18 *l. per ann.* which is a void reservation, because no certain time or day being appointed of payment, it would subject the lessee to an action of debt every hour (*a*); though the error be only in the second demise; yet the judgment being entire must be reversed *in toto*.

4 Mod. 76. Salk. 262. pl. 2. 2 Vent. 249. 270. S. C. (*a*) So, where *A.* brought an action on the case against *B.* for words spoken of him, and for causing him to be indicted, &c. and the jury found for the plaintiff as to both, and entire damages given; yet, it being afterwards held that the words were not actionable, the judgment was reversed *in toto*; but for this *vide* Cro. Jac. 424. Hob. 6. Roll. Rep. 24. Cro. Jac. 343. Allen, 75. Roll. Abr. 775. Vent. 27. 40.

Carth. 234.
5. Parker
and Harris,
adjudged in
B. R. and
the judg-
ment given
on demurrer
in C. B. re-
versed ac-
cordingly.

But in a writ of dower, if the plaintiff recovers by default, and upon this a writ is awarded to the sheriff or bailiff, where the recovery is to deliver to the plaintiff *tertiam partem per metas*, and to inquire of the value by the year; and how much time is past after the first demand of dower, and what damages she hath sustained; and upon this the sheriff or bailiff returns, that he had delivered the third part of the lands, and the value found by the jury to 30 *l. per annum*, and that two years are past after the first demand and damages 50 *l.* and thereupon judgment is given accordingly to hold in fealty the said third part, and to recover the said damages: in this case, though the judgment is not good as to the damages, in as much as it is not averred, that the husband of the plaintiff died seised (as the use is), nor is it so found by the jury; nor was it so commanded by the writ to be inquired, by which the judgment as to this is erroneous; yet it shall be reversed only as to this, and shall stand as to the recovery of the third part of the land.

Roll. Abr.
776. Tie
and Atkins.

So, in an action of account, if judgment is given *quod computet*, and after, auditors are assigned, and upon the account, judgment is given against the defendant, and damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment; but this shall stand in force, for these are two distinct judgments, and perfect; for the first judgment is *ideo consideratum est quod computet & defendens in misericordia*.

Cro. Eliz.
776. Wil-
liams and
White.
Cro. Eliz.
806. S. C.
adjudged.

If a judgment is given against executors in an action of debt, and after a *scire facias* judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first judgment shall stand.

5 Co. 32.
Petitoe's
case, &
vide Roll.
Abr. 776.

But if a man recovers in debt upon a judgment, if the first judgment be reversed, the second judgment shall also.

43 E. 3.
1 Roll. Abr.
777.

Sid. 253. S. P. and the court took time to advise, whether, by the reversal of the first judgment, the other was not *ipso facto* void. Palm. 187. *per* Dodderidge. The reversal of the first judgment does not reverse the second, but defeats it, so that the plaintiff shall have no fruit thereof. Palm. 303. S. P. *per* Chamberlain, J.

8 Co. 143. Roll. Abr. 777. After a recovery in a redisseisin, if the first judgment be reversed, the judgment on the redisseisin shall be reversed also.

Roll. Abr. 777. But By the reversal of the original judgment, the outlawry depending thereupon shall also be reversed.
 reversal of the outlawry, the original judgment shall not be reversed. Roll. Abr. 777. 2 Brownl. 39. S. P.

11 H. 4. 48. Roll. Abr. 777. If a man recovers in an annuity, and has a *scire facias* thereupon afterwards, and the judgment upon the *scire facias* is afterwards affirmed in a writ of error; yet if the first judgment of the annuity be reversed, the other shall be also.

8 Co. 143. Roll. Abr. 777. If a man recovers upon an original, and hath another judgment in a *scire facias*, if the first judgment be reversed, the other shall be also reversed.

26 E. 3. 75. Roll. Abr. 777. If a man recovers in a *quare impedit*, and hath a writ to the bishop, and after recovers against the bishop in a *quare non admittit*, and after the judgment in the *quare impedit* is reversed, the judgment in the *quare non admittit* shall be also reversed by this, though this was for the contempt to the king.

Roll. Abr. 777. If the demandant recovers against the tenant, and the tenant against the vouchee, if the heir of the vouchee reverses the judgment of the value, because the vouchee was dead at the judgment rendered; this shall reverse the judgment against the tenant also.

9 Co. 119. Roll. Abr. 777. If the principal is outlawed of felony, and the accessory attainted and executed, and after the principal reverses the outlawry, and is indicted, and found not guilty of the felony; by this reversal and acquittal, the attainder against the accessory is annihilated, for his heir may have a *mort d'ancestor*, it seems, because he hath no remedy by writ of error, or otherwise, to reverse it, for this depends upon the principal.

8 Co. 142, 143. 5 Co. 90. b. Roll. Abr. 777. If the confessee of a statute recovers in detinue by erroneous judgment against the garnishee, and sues execution; if the garnishee in a writ of error reverses the judgment given in the detinue, yet the execution is not reversed by this, because it is a collateral thing executed.

Leon. 317. Co. 76. b. Hob. 278. Cro. Eliz. If an infant and one of full age join in a fine, and the infant after brings error for the reversal thereof, it shall be reversed *quoad* the infant only.

115. 124. 2 Leon. 108. Moor, 565. 2 Jon. 182.

F. N. B. 21. Leon. 115. If husband and wife join in a fine when they are of full age, it shall bind them both; but if the feme be within age, they may join in a writ of error to reverse it (a) during the minority of the wife.

some books, the fine shall be reversed *in toto*, both against the husband and wife; as Cro. Eliz. 129. Leon. 115. Owen, 21.—But by others, the writ of error shall reverse the fine as to the wife, but no execution shall be awarded during the life of the husband. Bro. tit. Fines, 29. tit. Error, 28. Leon. 116.—And accordingly in 3 Lev. 36. Hutchinson's case, a *vacat* was entered *quoad* the wife only.

Roll. Abr. 775. F. N. B. 98. Cro. Eliz. 469. If a fine be levied of land, of which part is guildable, and part ancient demesne, and as to that which is ancient demesne, the fine be reversed by writ of *disseit*, yet the fine shall stand for the residue;

fidue; for a mark shall be made on the fine, in the nature of a cancelling of that which is ancient demesne only.

[Where a judgment is partly by the common law, and partly by statute, it may be reversed in part; for that which was a judgment at common law will remain a judgment, and be complete without the other.

A judgment in an information *qui tam*, &c. may be reversed as to the informer, and stand for the king.

And wherever the judgments are distinct, part may be affirmed, and the other part reversed. Hence, if a judgment for a common informer give damages for detention, and costs *de incremento*, the judgment for the penalty may be affirmed, and for the damages and costs reversed. But (a) where costs are merely accessory to the principal judgment, there, if they are erroneously given, the judgment cannot be reversed as to them only, but must be reversed *in toto*.]

Hardw. 50. S. P. Green v. Waller, 2 Ld. Raym. 893. S. P. (a) Lampen v. Hatch, 2 Str. 934. Rous v. Etherington, 2 Ld. Raym. 870. 1 Salk. 312.

Jon. 374.
2 Jon. 182.

Per Holt,
C. J.
1 Salk. 24.
Ca. temp.
Hardw. 50.
Moor, 565.

Frederick
v. Lookup,
4 Burr.
2221.
Bellew v.
Aylmer,
1 Str. 189.
S. P. Kent
v. Kent,
2 Str. 673.
Ca. temp.

2. What Judgment shall be given on the Reversal of the first.

If judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment shall only (b) be *quod judicium reversetur*; for the writ of error is brought only to be eased and discharged from that judgment.

Cro. Car.
442. Roll.
Abr. 774.
2 Saund.
256. Carth.

Salk. 262. pl. 2. 263. pl. 4. [Pugh v. Goodtitle on the demise of Bailey, House of Lords, 15th May 1787.] (b) If the error be error in fact, and not in the record, as for infancy, the judgment shall be *quod pro errore prædicto judicium prædictum revocetur*, without saying, & *aliis in recordis*. Roll. Abr. 805.—If judgment be affirmed in B. R. upon a writ of error, the judgment shall be *quod judicium redditum remanebit stabile in perpetuum*. 21 E. 4. 44. Roll. Abr. 805. [If defendant demur for duplicity, and have judgment, the entry shall be *quod judicium affirmetur*. Jeffry v. Wood, 1 Str. 439. If a release of errors, or the statute of limitations be pleaded, and found for the defendant, the judgment must be, *quod querens nil capiat per breve*, not, *quod judicium affirmetur*. Kirle v. Clifton, 1 Show. 50. Cunningham v. Houston, 1 Str. 127. Dent v. Lingwood, 2 Str. 683. Street v. Hopkinson, *id.* 1055. Ca. temp. Hardw. 345. In the House of Lords, if judgment below be given for the plaintiff, and deemed right, it is simply affirmed. Countess Dowager of Cavan v. Doe on the demise of Pulteney, 7 May 1795. So, if judgment be given in the Exchequer or King's Bench for the plaintiff, reversed in the King's Bench, or Exchequer-chamber, and that reversal approved by the Lords, their judgment is, that such second judgment be affirmed. Sutton v. Johnstone, 22 May 1787. Home v. Earl of Camden, 22 June 1795. So, if two former judgments concur, and are deemed right, they need only be affirmed. Foley v. Burnell, House of Lords, 27 April 1789.]

But if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, but the court shall also give such judgment as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given.

Cases, 57. Salk. 262. pl. 2. Carth. 243. 254. S. P. Ld. Raym. 5. 4 Mod. 106. pl. 5. Salk. 403. pl. 15.

Roll. Abr.
774. 805.
S. P. Cro.
Car. 442.
Yelv. 47.
2 Saund.
256. 317.
Show. Parl.
Skin. 447.

As in an action upon the case for words, if judgment be given against the plaintiff, that the words are not actionable, upon which the plaintiff brings a writ of error, and thereupon the first judgment is reversed, because the words are actionable; the court, after reversal of the first judgment, ought to give judgment, that

Roll. Abr.
774. Hop-
kins and
Chele. Cro.
Car. 509.
S. P. and
judgment

given ac-
cordingly.

Roll. Abr.
774.
Omulcunrie
and Ayres.
Cro. Car.
512. ad-
judged upon
a writ of
error out of
Ireland.

Lev. 310.
Cole and
Green.
2 Saund.
256. S. C.
adjudged,
and after-
wards af-
firmed in
parliament.

2 Lev. 11,
12. Hol-
beach and
Bennet.
2 Saund.
317. 319.
S. C. and
S. P. as to
the repleader
agreed, but
Hale *contra*.
Twisden
held the
issue was
aided by the
statute of
jeofails, and
said, the judgment could not be reversed for the faults in the avowry; and the judgment was affirmed.

Cro. Jac.
206. Faldowe
and Ridge,
adjudged.
Yelv. 74.
76.
Noy, 129.
S. C. ad-
judged.

(a) Carth.
319.
Skin. 514.

4 Inst. 270.
F. N. B. 19.
Skin. 515.
S. C. cited,

the plaintiff shall recover; for this court ought to give the same judgment which the first court might have done.

So, in an *ejectione firmæ*, upon not guilty pleaded, issue is joined, and a special verdict found, and upon this verdict judgment given against the plaintiff, and after the plaintiff brings a writ of error, in which the judgment is reversed, the plaintiff shall have judgment, and recover his term, his declaration being good, and the law being for him upon the special verdict; for the court that reverses the first judgment ought to give the same judgment which ought to have been given in the first suit.

If in an action of waste in the *hussings* in *London*, judgment is given for the defendant, and after upon a writ of error brought before commissioners in *St. Martin's*, according to the custom of the city, that judgment is reversed, the commissioners shall give the same judgment as before ought to have been given; for the custom of proceeding in *London* shall be intended according to the common law, if no precedent appear to the contrary.

In replevin *in banco*, the defendant pleaded a lease made 1 Octob. &c. and avowed for rent reserved thereupon; and the plaintiff, in bar thereof, pleaded *non dimisit 1 Octob. &c. modo & forma*; upon which issue being joined, it was found for the plaintiff, and judgment for him, and the defendant brought error in *B. R.* and it was agreed to be an immaterial issue, and the judgment erroneous, and yet that the court could not award a repleader, as the Common Pleas might have done (and as the ancient usage was, but disused for one hundred years); and there being gross faults in the avowry, it was said, that if they reversed the judgment, perhaps they must give judgment upon the declaration for the faults in the avowry.

And said, the judgment could not be reversed for the faults in the avowry; and the judgment was affirmed.

In trespass brought in *B. R.* judgment was given for the defendant upon his demurrer to the plaintiff's replication, and he brought error in the Exchequer-chamber; and this judgment was reversed, and judgment given *quod recuperet*; and after the record being remanded, a writ of inquiry of damages was awarded, and upon the return thereof, judgment given, that the plaintiff should recover the damages found for him, though the statute 27 Eliz. c. 8. mentions only the returning of the record, and that execution shall be intended, therefore that all shall be done that is necessary in order thereto.

But in the case of (a) *Phillips* and *Bury*, where the House of Lords reversed the judgment that was given in *B. R.* on a special verdict, there the House of Lords gave a new judgment, which was executed accordingly, on refusal of the *B. R.* to give a contrary judgment to what they had given before, although it was objected that they could not, having a transcript only, and not the record itself, before them.

If in a writ of right close in ancient demesne, the demandant makes his protestation to sue in nature of a *mort d'ancestor*, and the

the tenant pleads in abatement, and judgment is given for him; and after, upon false judgment brought, the writ is affirmed good, the court of Common Pleas shall proceed as the inferior court should have done.

[If the Exchequer-chamber reverse a judgment in *B. R.* for defendant upon demurrer, they cannot award a writ of inquiry of damages, their power being confined by the stat. 27 *Eliz. c. 8.* merely to the affirming or reversal of the judgment, but they must remit the record to *B. R.* with an order to that court to award a writ of inquiry and execution on the return of it. *Kent, Ca. temp. Hardw. 51.*

It is now settled, though it was in one case (*a*) denied, that a court of error may award a *venire facias de novo*. And this it may do, after a bill of exceptions allowed, upon a demurrer, to evidence, and after a general verdict, when some of the counts are defective.]

Baker, 3 Term Rep. 27.—In *Kinaaston v. Mayor, &c. of Shrewsbury, 2 Str. 1051.* 4 *Br. P. C. 271.* *Hafwell quitam v. Chaile, 2 Str. 1124.* *Andr. 392.* *Parker v. Wells, 1 Term Rep. 783.* *Lickbarrow v. Maſon, 5 Term Rep. 367.* the House of Lords directed a *venire de novo* to be awarded by *B. R.* (*a*) *Street v. Hopkinson, 2 Str. 1055.* *Ca. temp. Hardw. 345.*—In *Trevor v. Wall, 1 Term Rep. 151.* the court of *E. R.* refused to award such a writ, on the ground that the proceedings upon which error was brought originated in an inferior court. But in *Davis v. Pierce, 2 Term Rep. 125,* where a bill of exceptions had been tendered in the court of Great Sessions in Wales; and the proceedings were removed by writ of error into *B. R.*, that court being of opinion, that the bill was properly tendered, awarded a *venire de novo* into the next English county.

3. To what the Parties shall be restored on the Reversal of the first Judgment.

If a man recovers by erroneous judgment, and by virtue thereof presents to a church, or enters into the perquisite of his villein; and after the judgment is reversed, these collateral things executed shall not be devested thereby; but collateral things executory are, after reversal, as (*b*) if no judgment had ever been. *8 Co. 142. b.* (*b*) In an assise, if the tenant loses by verdict, he shall be restored to the lands, if it be reversed in a writ of error. *8 H. 6. 2. Roll. Abr. 778.*—So, he shall be restored to the meise issues. *8 H. 6. 2.* So, if the tenant loses in a writ of entry *sur disseisin*, and after it is reversed for error, he shall be restored to the meise issues. *Roll. Abr. 778.*

If a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff had sold it by the command of the writ of *fieri facias*. *8 Co. 19: 143. Roll. Abr. 778. Cro. Eliz. 278. Moor, 573. & vide Leon. 96. 3 Leon. 89. Godb. 27. Goult. 103. Cro. Jac. 246.*

But if the goods of an outlawed man are sold by the sheriff upon a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored (*c*) to the goods themselves, because the sheriff was not compellable to sell those goods, but only to keep them to the use of the king. *5 Co. 90. Hoe's case. Roll. Abr. 778. S. C. cited. Cro. Eliz. 278. S. P. ad-*

judged, where a termor being outlawed upon the statute of recusancy, the lord treasurer and barons of the Exchequer sold the term. (*c*) If the king grants over the land of a person outlawed for treason or felony, and afterwards the outlawry is reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *seire facias* against the patentee. *2 Hawk. P. C. c. 50. § 19. cited 1 And. 188.*

Roll. Abr.
778. Cro.
Jac. 246.
Yelv. 179.
Brownl.
107, 108.
S. P. ad-
judged.

(a) That it
would be
otherwise if
fold to a
stranger.
Yelv. 108.
Brownl.
107, 108.

Roll. Abr.
778.

8 Co. 142. b.
3 Mod. 325.
S. C. cited.
* This must
mean of a prisoner in execution.

3 Co. 142. a.

2 Co. 143. a.

Moor, 269.
Beverly and
Cronwal.

Moor, 269.
agreed *per*
curiam.

Cro. Eliz.
170. Og-
nel's case,
adjudged.
(b) *Vide* 13
Co. 20. 22.

Cro. Jac.
645. Ap-
pesley and
Sir John
Key, agreed
per curiam.
Palm. 187. 301. S. C.
Querela.

If a man recovers damages in a writ of covenant, as the particular case was, against *B.*, and hath an *elegit* of his chattels, and of the moiety of his lands; and the sheriff upon this writ delivers a lease for years of land which *B.* had, to the value of 50 *l.* to him that recovered, *per rationabile pretium & extentum* (as the words were) to have as his own term, in full satisfaction of 50 *l.* part of the sum recovered; and after *B.* reverses the said judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet (a) here is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale; and therefore the owner shall be restored.

And for the same reason, if personal goods were delivered to the party *per rationabile pretium & extentum*, upon the reversal of the judgment, he shall be restored to the goods themselves.

If in debt upon an escape * the plaintiff recovers, and hath execution, and after, the first judgment is reversed; yet the judgment for the escape remains in force.

But if an action of escape be brought against the sheriff, and the judgment upon which it is founded be reversed before such time as the defendant is forced to plead, he may plead *nul tiel record*.

But there is a diversity between a recovery by prior title, and a reversal of a judgment by writ of error; as, if a woman hath judgment and execution in dower in ancient demesne, and it is after reversed in a writ of false judgment; and because she had held the lands for two years between the first judgment and reversal, the value of the land was inquired, and taxed at twenty marks; in a *scire facias* against her, it was adjudged, she could not plead a recovery in a writ of right close in nature of a *cui in vita*.

If an advowson comes to the king by forfeiture upon an outlawry, and the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson.

But if a church is void at the time of the outlawry, and the presentation is thereby forfeited, as a chattel principally and distinct of itself, there, upon the reversal of the outlawry, the party shall be restored to the presentation.

If a termor, being outlawed for felony, grants over his term, and after the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment (b); for by the reversal it is as if no outlawry had been, and there is no record of it.

If after judgment in a *scire facias* against bail, the judgment against the principal is reversed (c); this is no reversal of the judgment against the bail, because it is a collateral judgment by itself.

(c) But the bail may be relieved by *audita querela*; for which see title *Audita Querela*.

Escape in Civil Cases.

ESCAPE in general is understood, where any person, who is under lawful arrest, and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.

For the better understanding whereof I shall consider,

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be judged an Escape: And herein,

1. Where the Authority by which he is committed shall be said to be sufficient for that Purpose.
2. Where the Form of the Commitment, or being in Custody, shall be said to be regular.

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. With what Strictness Prisoners are to be kept.
2. What on this Account shall excuse the Sheriff, Gaoler, &c. when acting in Obedience to some Authority; as removing a Prisoner on a *Habeas Corpus*, &c.
3. What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.

(C) Of the Difference between voluntary and negligent Escapes.

(D) Of the Difference between an Escape on Mesne Process and Execution.

(E) What Persons are answerable for, and to be charged with an Escape: And herein,

1. Of the preceding or succeeding Sheriff, Warden, &c.
2. Where Sheriffs, Wardens, &c. their Superiors or Deputies, are liable at the Election of him who is injured by the Escape.
3. Where the Party injured may have his Remedy against the Person escaping; and herein of Escape Warrants.

(F) Of

(F) Of the proper Remedy and Nature of the Action to be brought for an Escape.

(G) Of the Manner of laying the Action.

(H) Of the Party's Defence who suffered the Escape; and herein of pleading fresh Suit.

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be adjudged an Escape: And herein,

1. Where the Authority by which he is committed shall be said to be sufficient for that Purpose.

(a) This distinction is laid down in Moor, 274. Dyer, 175. Poph. 203. Leon. 30. 8 Co. 141. b. 5 Co. 64. Cro. Jac. 3. 280. 289. 2 Bull. 64. 256. 2 Saund. 100, 101. 3 Mod. 325. **I**T seems agreed as a general rule (a), that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such person to go at large is an escape; for he cannot judge of the validity of the process, or other proceedings of such court, and therefore cannot take advantage of any errors in them. Hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous. But if the court has no jurisdiction of the matter, then all is void, and consequently, the officer not punishable for suffering a person taken up upon such void authority to escape. Carth. 148. 234.

Cro. Eliz. 138. Bushe's case. (b) Salk. 273. Shirley and Wright, S. P. adjudged; but there said that it would be otherwise, **U**pon this distinction it hath been adjudged, that if *A.* obtains judgment against *B.*, and a year afterwards, without any *scire facias*, takes out a *capias ad satisfaciendum*, upon which *B.* is taken, and the sheriff lets him go at large, that this is an escape; for though the award of the *capias* (b) after the year without a *scire facias*, was erroneous, yet the sheriff could not take advantage thereof, for it was sufficient authority for him to make the arrest, and might have been pleaded by him in an action of false imprisonment.

had it been on a *capias ad respondend.* bearing *teste* in Trinity term, and returnable in Hilary, because such process must be returnable from term to term, otherwise it is out of court.

Cro. Eliz. 576. Sheriff of Durham's case, adjudged. Cro. Jac. 3. Moor, 274. 2 Leon. 84. S. P. adjudged; but **S**o, where upon a recognizance in Chancery, the conusee sued out execution by a *capias ad satisfaciend.* by force whereof the conusor was taken and escaped; the court held, that, though the *capias ad satisfaciend.* in this case was erroneously awarded, yet it was a good execution for the party as long as it continued unrevoked, and consequently, the sheriff liable for the escape. Yelv. 46. which seem contrary.

So, where in debt for an escape, it was found by special verdict, that the plaintiff had outlawed *J. S.* after judgment upon a *capias ad satisfaciend.* sued out within the year, and that two years after the outlawry he was taken up upon a *capias utlagatum*, and the sheriff suffered him to escape; it was admitted, that if a *capias utlagatum* had been sued out within the year, no prayer to charge him in custody had been necessary, because the plaintiff might have had a *capias ad satisfaciend.* without a *scire facias*; but this being after the year, the question was, Whether he could be said to be in execution for the plaintiff in the original action without prayer? and the court held that he was, though no prayer was entered, because he would have been (a) so, if he had been taken within the year; and here is no difference, for the plaintiff was at the end of his process at the exigent, and no continuance or *scire facias* after a *capias utlagatum*, and the very *capias utlagatum*, which is sued at his charge, imports an election of the body.

If at the petition of *A.* and the rest of the creditors of *B.*, a commission upon the statute against bankrupts is issued out against *B.*, and thereupon the commissioners sit and offer interrogatories to *C.* and he refuses to be examined, and by them is thereupon committed to prison, and the gaoler suffers him to escape; as the commissioners had sufficient authority to commit, and *A.* was prejudiced by the escape, he may maintain an action against the gaoler.

So, if there be a suit in the ecclesiastical court between *A.* and *B.*, in which *B.* is excommunicated, and afterwards taken upon an *excommunicato capiendo*, and suffered to escape, *A.* may bring an action on the case for the escape, though it was objected that this was a spiritual matter, and that *A.* had other remedy, as by writ of recaption.

Also, upon this rule, that the sheriff cannot take any advantage of the irregularity of the proceedings of a court which hath jurisdiction of the matter, it hath been holden (b), if a nobleman be taken in execution, and the sheriff let him go, it will be an escape*.

to be taken in execution, and no court having power to award an execution against the person of a peer, in a civil suit?

Upon the second part of the distinction, that an officer shall not be liable to an action for the escape of a person taken on a writ, which issued out of a court that had not jurisdiction of the matter; it hath been (c) holden, that if *A.* bring an action against an officer of an inferior court for an escape, and declare that he brought an action against *J. S.*, in the court of *Kingston upon Hull*, upon an obligation made at *Halifax* in *Com. Ebor.* (but do not allege it to be within the jurisdiction of the court), and that he obtained judgment, upon which *J. S.* was in execution, and suffered to escape by the defendant; that this declaration for want of alleging *Halifax* to be within the jurisdiction of the inferior court, is insufficient to maintain the action; for though the action be in its own nature transitory, yet (d) inferior courts being tied down to matters arising within their own limits, they must shew

Salk. 319.
Wolf and
Davison.
5 Mod. 206.
S. C. re-
judged.

(a) 5 Co.
83. a.
Garnon's
case, ad-
judged.
Bridgm. 6.
Roll Abr.
810. S. P.
adjudged.

Roll. Rep.
47. Barnea
and Cary,
adjudged.
Moor, 834.
pl. 1123.
S. C. ad-
judged; and
note, accord-
ing to Moor,
the action was debt.

Lutw. 121
to 123.
Slipper and
Mafon, ad-
judged.

(b) 2 Bulst.
65.
* *Qy. de*
ecc. the de-
fendant not
being liable

(c) Roll.
Abr. 809,
810.
Richardson
and Bar-
nard, ad-
judged.
(d) So,
though a
writ issue
out of a su-
perior court,
yet, if such
superior
court had
not jurisdic-
tion of the
matter, it
will be void,
that

and the officer may take advantage thereof, as if a *formedon* issue out of the King's Bench, or an appeal out of the Common Pleas. 2 Bullst. 64. & *vide* 5 Mod. 413. Ld. Raym. 397. 5 Mod. 413. Carth. 234.

2 Mod. 29, 30. Squibb v. Hole, adjudged by three judges against Justice Ellis. So, if *A.* declares that he prosecuted one *J. S.* in the court of *Ely*, upon a bond made *infra jurisdictionem*, upon which he was in execution, and that the defendant suffered him to escape; if the jury find that there was such a prosecution, but that the bond was not made *infra jurisdictionem*, the action does not lie; for all that was done was *coram non judice*, and therefore no legal commitment; and though the defendant in the court below pleaded *non est factum*, yet that could not give the court any jurisdiction which it had not originally in the cause.

Bull v. Steward, 1 Will. 255. [In an action on the case against the defendant, bailiff of the borough court of *Southwark*, for an escape upon mesne process, it was moved in arrest of judgment, that the declaration was ill, because it appeared that the plaint in the court below was levied against *two* persons, but only *one* was proceeded against, so that the plaintiff, by process against *one* only, could not have had the effect of his suit below. To this it was answered, and resolved *per curiam*, that even supposing the plaint to be erroneous, yet the officer shall not take advantage thereof in a collateral action as this is; he may justify the arrest under the process, and shall not be suffered to say in this action, that the plaintiff could not have the effect of his suit below. It was then objected, that the declaration did not allege in what manner the defendant below was indebted to the plaintiff; but only in general that he was indebted: it might be on a judgment, or such a debt as that court had no jurisdiction of: nor did it appear, that the cause of action arose within the jurisdiction. To this it was answered, and resolved *per curiam* (a), that this being after a verdict, they would suppose every thing proved at the trial which was necessary to be proved; and that the cause of action arose within the jurisdiction, unless the contrary could be made to appear upon the face of the record.

See tit. "*Trespass*" (D).]

2. Where the Form of the Commitment, or being in Custody, shall be said to be regular.

(a) Bro. Escape, 22. (b) And therefore it seems that an officer who arrests a person on a Sunday contrary to the 29 Car. 2. c. 7. cannot be charged with an escape for letting him go again, *vide* 6 Mod. 95. Salk. 78. (c) But if an officer refuses to arrest a person that he may, an action on the case lies against him; and hence it hath been adjudged, that if a *capias ad satisfaciend.* is directed to the coroners of a county, and one of them, when he may arrest the party, refuses so to do, the

person on a Sunday contrary to the 29 Car. 2. c. 7. cannot be charged with an escape for letting him go again, *vide* 6 Mod. 95. Salk. 78. (c) But if an officer refuses to arrest a person that he may, an action on the case lies against him; and hence it hath been adjudged, that if a *capias ad satisfaciend.* is directed to the coroners of a county, and one of them, when he may arrest the party, refuses so to do, the

the plaintiff must bring his action singly against the coroner so refusing, for this is a personal tort. 2 Mod. 23, 24. See *Ld. Raym.* 331. 10 Mod. 251. 255.

But if *A.* is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of *J. S.*, upon the delivery of the writ, *A.* by construction of law is (a) immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare, that he was arrested by virtue of the second writ, which is the operation it hath by law, and not according to the fact.

5 Co. 89.
Frost's
case.
(a) So, if
the sheriff of
Northum-
berland has
a man in
custody in
Northum-

berland, and the sheriff himself is in London, and a writ is delivered to him against that person, he is in his custody immediately upon that writ: otherwise, if the man was out of the county at the delivery of the writ; as in case the sheriff was bringing him to *Westminster* on a *habeas corpus*. *Salk.* 273. pl. 6. *per Holt*, Ch. Just.

So, in escape against the sheriffs of *London*, the plaintiff may declare, that he levied a plaint in the sheriff's court against *J. S.* being then in the counter, in custody on a former plaint levied against him by *J. S.*, and being so in custody was suffered to escape; for the entering of the plaint is of the nature of a writ or precept in another court, upon which the *serjeant at mace* arrests the party by his general authority; and therefore by entering the plaint, and charging the defendant in the counter, he is in actual custody of the sheriff.

Salk. 273.
pl. 6.
Jackson and
Humphreys.

If *A.* declares against the marshal of the King's Bench for the escape of a prisoner (b), formerly in the *Fleet*, that he *virtute brevis de habeas corpus*, directed to the warden of the *Fleet*, was *debito modo commissus* to the King's Bench; this will not be sufficient, without alleging an actual commitment, for he cannot be committed on a *habeas corpus*, and the *debito modo* will not help it.

2 Show. 17.
pl. 10.
Bourne and
Cooling, ad-
judged, and
judgment
arrested ac-
cordingly.

(b) If *A.* obtains judgment against *B.* in *B. R.*, and also another judgment in *C. B.*, upon which he is taken in execution and committed to the *Fleet*, and afterwards he removes himself to the *Marshalsea* by *habeas corpus cum causa*, if the marshal suffer him to escape, he is liable to both debts.

Dyer, 152.

If by *habeas corpus* the body of *J. S.* together with a plaint entered against him in the court of *Norwich*, be removed before the chief justice of *B. R.*, who upon the return of the writ accepts bail, the acceptance of bail, though before the filing thereof, is a discharge of the prisoner; and though afterwards a *procedendo* should be awarded, yet the sheriff cannot be charged with the escape.

Cro. Jac.
203. *Far-*
neby and
Basset.

If a person out upon bail renders himself in discharge of his bail, and a *redditi se* is entered in the judge's book, and a *committitur* filed in the office, and the prisoner afterwards escapes; yet if no notice was given the marshal of such render, nor any entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial.

Salk. 272.
pl. 3.
Watson v.
Sutton.

It hath been held, that entering a *committitur* upon the roll was not sufficient evidence to charge the marshal with an escape, without proving an actual imprisonment; but that proving the party to be actually in prison, though there be no entry made in the

Sid. 220.
Keb. 775.
Conny and
Jacob.

marshal's book (without which he pretends he knows not how to take charge of them) is sufficient.

Wightman
v. Mullens,
2 Str. 1226.

[In an action against the marshal for an escape, it was laid, that the prisoner being brought before Sir *William Chapple*, one of the justices of our lord the king, at his chambers in *Serjeants Inn*, was there committed to the custody of the marshal at the suit of the plaintiff, as by the said commitment may more at large appear. To this the defendant demurred, and shewed for cause, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marshal's custody, till the commitment is entered on record; nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only styled one of the justices of the king, which every common justice of the peace is.]

And now for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, by the 8 & 9 W. 3. c. 27. it is enacted, "That if any person, desiring to charge any person with any action or execution, shall desire to be informed by the marshal or warden, or their respective deputy or deputies, or by any other keeper or keepers of any other prison or prisons, whether such person be a prisoner in his custody, or not, the said marshal or warden, or such other keeper or keepers of any other prison or prisons, shall give a true note thereof in writing, to the person so requesting the same, or to his lawful attorney, upon demand, at his office for that purpose, or, in default thereof, shall forfeit the sum of 50*l*. and if such marshal or warden, or their respective deputy or deputies, exercising the said office, or other keeper or keepers of any other prison or prisons, shall give a note in writing, that such person is an actual prisoner in his or their custody, every such note shall be accepted and taken as a sufficient evidence, that such person was at that time a prisoner in actual custody."

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. With what Strictness Prisoners are to be kept.

Plow. 36.

3 Co. 44.

2 Inst. 381.

Roll. Abr.

Every person in prison by process of law is to be kept *in salva* & (a) *arcta custodia*, in order to compel him the more speedily to pay his debts, and make satisfaction to his creditors.

8c6. (a) And by Westm. 2. c. 11. *Carceri mancipentur in foris*, which, my Lord Coke says, was enacted in order to oblige them to a more speedy compliance with their duty. 3 Co. 44. a. and 2 Inst. 381. in his comment on this statute, he says, that though prisoners, if need require, may now be kept in irons, yet that it could not be done by the common law.—And Co. Lit. 260. a. he says, imprisonment must be *custodia* & *non pœna*, for *carcer ad homines custodiendos, non ad puniendos, dari debet*.

Roll. Abr.

8c6.

3 Co. 44.

Therefore, if the sheriff or other officer who hath the custody of a prisoner, either bail him when he is not bailable by law, or suffer him

him to go out of the (a) limits of the prison, though with a keeper, and for ever so short a time, it is an escape.

Plow. 36.
Dyer, 166.
Hetly, 34.

(a) For the limits of the Fleet prison, *vide* 2 Mod. 221, 222.

But the law and provision made by *Westm. 2. c. 11.* being eluded by the acts and contrivances of sheriffs, and other keepers of prisons, by the 8 & 9 *W. 3. c. 26.* it is enacted, "That all prisoners, either upon contempt or mesne process, or in execution, who are or shall be committed to the custody of the marshal of the *King's Bench* prison or warden of the *Fleet*, shall be actually detained within the said prisons of the *King's Bench* and *Fleet*, or the respective rules (b) of the same, until they shall be from thence discharged by due course of law; and if at any time the said marshal or warden, or any other keeper or keepers of any prison, shall permit and suffer any prisoner committed to their custody, either on mesne process, or in execution, to go or be at large out of the rules of their respective prisons (except by virtue of some writ of *habeas corpus*, or (c) rule of court, which rule of court shall not be granted, but by motion made, or petition read in open court), every such going or being out of the said rules shall be adjudged and deemed, and is hereby declared to be, an escape."

[(b) This statute having made the rules to all intents the same as the walls of the prison, it follows, that an escape from them, without the marshal's knowledge, cannot be considered as a voluntary escape. *Bonauss v. Walker*, 2 Term Rep. 126.]
(c) The intent of a day-rule is,

that the prisoners may be brought to Westminster-hall, and by indulgence they have been allowed to go to any of the inns of court, to consult with their counsel or attorneys; but suffering them to go on their pleasure, as to a playhouse, &c. is an escape. 2 Show. 298. pl. 300.

2. What on this Account shall excuse the Sheriff, Gaoler, &c. when acting in Obedience to some Authority, as removing a Prisoner on a *Habeas Corpus*, &c.

The writ of *habeas corpus* is an (d) ancient writ, and what the subject is by law entitled to; yet (e) if a sheriff or other officer, who hath the custody of a prisoner, by colour thereof, suffer the prisoner to go at large, it is an escape.

(d) Cro. Car. 14.
Roll. Abr. 808.
(e) Heb. Cro. Car. 14.

202. 3 Co. 44.

As, if a *habeas corpus* be returnable the next term, and the sheriff or gaoler in the meantime suffer the prisoner to go at large, it is an escape, though he appear at the return of the writ; for the writ only empowers the gaoler to bring him directly to the court, and if he gives him any liberty in the meantime, it is at his peril.

Hard. 476.
agreed by Hale, Chief Baron, and the whole court.

So, where a *habeas corpus ad testificand.* was directed to the marshal to carry one *Reynolds* to the assizes at *Wells* in *Somersetshire*, who after the assizes was suffered to go sixty miles beyond *Wells*; though he returned again to the marshal, yet it was held an escape.

Mod. 116.
Mosedell's case. So ruled upon evidence, and the plaintiff had

a verdict for 6200*l.* 3 Keb. 305. S. C. (f) If *J. S.* is in execution, and a *habeas corpus ad testificandum* is directed to the gaoler, who, according to the command of the writ, carries the prisoner to give his testimony; this is an escape. Sid. 13. said by Twissden to have been adjudged by all the judges.

Mod. 116.
per Hale.
[2 Bl. Rep.
1050.]

(a) That he is to bring him in convenient time, and the most convenient way; and this is to be judged of by the judges. Cro. Car. 14. Dalt. Sheriff, 561.

3 Co. 44.
Milton's
case.

Also, it hath been adjudged, that if the sheriff hath one in execution, and a *habeas corpus* issues to have his body in court such a day, and before the return of the writ the sheriff brings the prisoner to an inn in *Smithfield* in his way to *Westminster*, and the prisoner of his own head goes without any keeper to *Southwark*, and next morning returns again to the sheriff, so that at the return of the *habeas corpus* the sheriff delivers the prisoner into court, this is no escape.

Planck v.
Anderson,
5 Term
Rep. 37.

[If a sheriff, having arrested a defendant on *mesne* process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action as for an escape, if the jury find, that the plaintiff has not been delayed or prejudiced in his suit.]

Dalton She-
riff, 486.

As the sheriff must be careful that he does not give the prisoner more liberty than by law he ought to do, when he acts in obedience to a lawful authority; so he must take care that he does not let him go at large by colour of a void authority.

Dyer, 297.
a. Roll.
Abr. 808.
S. C.

Therefore, if one in execution at the suit of the king and a private person be, by warrant from the lord chancellor or treasurer, suffered to go at large with a keeper, in order to collect the money due to the king; this is an escape, as to the private person, although he return again to prison; for the king himself cannot license one in prison to go at large with a keeper.

Cro. Eliz.
593. Col-
ton v.
Rofs and
Levet.
Vide tit.
Privilege.

So, where the sheriffs of *York* pleaded, that they let the prisoner go at large by virtue of a writ of privilege directed to them from the council of *York*; and it not appearing to the court that the writ was a sufficient warrant for that purpose, or that the council of *York* could in such case discharge a prisoner, the plea was held ill.

Salk. 273.
pl. 5.
[(b) The
contrary was
adjudged in
Sir Thomas
Orby's case,
1 Ld. Raym.
3. 4 Mod. 355.]

If an act of parliament is made for the relief of confined debtors, and pursuant thereto the justices of the peace are enabled to discharge such and such prisoners, if they authorize the sheriff to discharge a person that does not come within the description of the act, and he lets the party go at large, it will be an escape (b).

for instance, exceeds that which the statute allows a discharge for, the justices have no jurisdiction, and the sheriff is bound to take notice at his peril for what sum his prisoner is charged in execution.]

Langton v.
Wallis, 1 Ld.
Raym. 399.
1 Lutw.
582. S. C.

[Debt was brought by the plaintiff, executor of *A.*, against the defendant as executor of *B.* formerly sheriff of the county of *D.* Upon *nil debet* pleaded, the jury found a special verdict, viz. that *A.* recovered a judgment against *F.* and sued a *capias ad satisfaciendum* directed to *B.* then sheriff, &c., which writ was executed by the under-sheriff, and *F.* being in custody, assigned a term for years to the under-sheriff in satisfaction of the money recovered by the

the judgment, and to be discharged out of execution, which assignment was to be void upon payment of the money recovered by the judgment at a day, after *B.*'s office would determine. Upon this *B.* was discharged out of execution, and at the day, &c. he paid the money to the under-sheriff; but the under-sheriff did not pay the full money to *A.* *B.* died; and *A.* died; and the plaintiff as executor of *A.* brought this action.—It was adjudged, that it did not lie; because the release of *B.* out of custody was an escape in the sheriff, and the receipt of the money afterwards could not purge it.]

3. What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.

The marshal of the King's Bench being sued to judgment, if he be afterwards taken in execution, he can be admitted to no other prison but the *Marsbalsea*; and if he is committed to that prison whereof he is keeper, without securing the prisoners there first, it will be an escape in law of all the prisoners. Style, 465.
per Glyn,
C. J. & vide
Dalton Sher-
riff, 487.

If a woman warden of the *Fleet* prison marries her prisoner, or if a sheriff, &c. marries a woman in execution with him, in either case it will be deemed an escape in law. Plow. 17.

If a man hath judgment against two (*a*) persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody. Roll. Abr.
810.
(a) So, if
baron and
feme are
taken in

execution, if the feme escapes, the sheriff shall answer the whole debt, though the baron continues still in execution. Roll. Abr. 810. Cio Jac. 657. S. P.

By the 8 & 9 *W. 3. c. 27.* it is enacted, "That if the marshal or warden for the time being, or their respective deputy or deputies, or other keeper or keepers of any other prison or prisons, shall, after one day's notice in writing given for that purpose, refuse to shew any prisoner committed in execution to the creditor, at whose suit such prisoner was committed or charged, or to his attorney, every such refusal shall be adjudged to be an escape in law."

(C) Of the Difference between voluntary and negligent Escapes.

IT was formerly held, that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debitor ex delicto*. Leon. 73.
Arundell
and Wy-
tham. Hob.
202. S. P.
per Hobart,
in the Sher-
riff of Essex's case.

But the latter resolutions have been contrary; and it has been (*b*) adjudged, that where a sheriff suffered a voluntary escape, the plaintiff (b) Sid. 330.
Allanfon
and Butler,

Show. 174. plaintiff might have a new action of debt or *scire facias quare executionem non* against the prisoner.
 Buxton and Home,
 2 Mod. 136. Baffer and Salter, Vent 269. 2 Jon. 21, 22. Mod. 194. Compton and Ireland.
 2 Lutw. 1264. Suddal and Wytham.

Also, the statute 8 & 9 W. 3. c. 26. hath taken away all distinction between voluntary and permissive escapes with regard to the plaintiff's remedy; for thereby it is enacted, "That if any prisoner, who is or shall be committed in execution to either or any of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors, at whose suit such prisoner was charged in execution at the time of his escape, shall or may retake such prisoner by any new *capias* or *capias satisfaciend.* or sue forth any other kind of execution on the judgment, as if the body of the prisoner had never been taken in execution."

Carter, 212. But yet there remains a difference as to other purposes between permissive and negligent escapes; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him.
 [2 Will. 295.
 5 Term Rep.
 25. & vide the authorities *supra*.]

Ravencroft v. Eyles,
 2 Will. 295. [And where the escape is voluntary, nothing afterwards can purge it; for whenever a gaoler commits a voluntary escape, from that moment he commits a tort.]

3 Mod. 146. If the marshal of the *King's Bench* or warden of the *Fleet*, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office.
 Carter, 212.

And now, by the 8 & 9 W. 3. c. 26. a further penalty is added, which enacts, "That if any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, reward or gratuity whatsoever, or security for the same, to procure, assist, connive at, or permit any such escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons, as aforesaid, shall for every such offence forfeit the sum of 500 *l.* and his said office, and be for ever after incapable of executing any such office."

(D) Of the Difference between an Escape in Mesne Process and Execution.

2 Roll. Abr. 99. 807. IF the sheriff suffer a person arrested on mesne process to escape, an action lies against him at (a) common law, from the delay and prejudice which the party suffers thereby.
 Proby and Lumley.
 Moor, 852. Cro. Eliz. 623. 652. 863. Cro. Jac. 280. (1) And by the express words of 8 & 9 W. 3. c. 26. [2 Bl. Rep. 1049.]

2 Roll. Abr. 807. But there is this difference between an escape on mesne process, and execution, that if the sheriff arrests a person on mesne process, and
 Jon. 207. and

and he is rescued by J. S., he may return the rescue, and such return is good, and no action of escape lies against him after such return; but the court will issue process against such rescuer, or fine him; for in this case, though the sheriff may, yet he is not obliged to raise the *posse comitatus*.

But after an arrest on a *capias ad satisfaciend.* the sheriff cannot return a rescue, for in such case, the sheriff is obliged to raise the *posse comitatus*, if needful; and therefore, if he return a rescue, an action of escape lies, or a new *capias* (a), for the return of an ineffectual execution is as none.

Abr. 904. 8 Co. 142. [Upon the same principle the gaoler will be liable for an escape upon the rescue of one brought out of gaol by *habeas corpus* between judgment and execution. Crompton v. Ward, 1 Str. 429.]

Also, upon an arrest on mesne process, the sheriff is obliged to take bail by the statute 23 H. 6. c. 10. therefore, if the plaintiff declares, that the defendant being sheriff of Y. did arrest J. S. at the suit of the plaintiff, and afterwards did suffer him to go at large; and the defendant pleads the statute, and that he took good and sufficient bail, and the plaintiff replies and traverses, that the defendant took good and sufficient bail; this action does not lie; for *quoad* the plaintiff, the sufficiency of the bail is altogether immaterial, it is for the security of the sheriff; and if the party does not appear, the plaintiff need not take an assignment of the bail-bond, but proceed against the sheriff by way of amercement, and leave the sheriff to take his advantage against the bail.

(E) What Persons are answerable for, and to be charged with an Escape: And herein,

1. Of the preceding or succeeding Sheriff, Warden, &c.

WHERE a new sheriff is appointed, his predecessor ought to deliver over by (b) indenture all the prisoners in his custody, charged with their respective executions; for the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omits to deliver them over, every omission will be deemed an escape, wherewith he will be chargeable.

(b) See the form thereof, Dalt. Sheriff, 18.

As, where one *Bustard* was in execution in the custody of the defendants, then sheriffs of London, as well at the suit of A. as at the plaintiff's suit, and the defendants at the end of the year delivered over the body of *Bustard* to the new sheriffs by indenture, wherein the execution at the suit of A. was mentioned, but the execution at the plaintiff's suit was omitted, and afterwards *Bustard*, in the time of the new sheriffs, escaped; it was resolved by the whole court, that the defendants being the old sheriffs should be charged with this escape, for that the old sheriffs ought to have given (c) notice to the new sheriffs of all

Roll. Rep. 383.
3 Lev. 46.
Roll. Abr. 807. vide the authorities *supra*.
(a) Cro. Car. 240.
255. Roll.
2 Mod. 177.
Ellis and Yarborough, adjudged.
1 Mod. 237. S. C.
1 Freem. 219. S. C.
Gilb. C. P. 22. S. C.
See 1 Ld. Raym. 425.
1 Saik. 99.
6 Mod. 122.
Noy, 72.
Semb. *contra*.
Hob. 266.
2 Roll. Abr. 457.
Cro. Eliz. 365.
Bull. 70.
2 Leon. 54.
4 Co. 72.
Sheriff, 18.
3 Co. 71.
Westley's case.
c) That such notice may be by word only, or by some note in writing under the old sheriff's hand, or under the

hand of his under-sheriff, and need not be by indenture, unless the new sheriff require it. Moor, 689. Dalt. Sheriff, 16. Cro. Jac. 588.

3 Co. 72. But if the sheriff dies during his shrievalty, the new sheriff, as soon as he is appointed, must take notice of all persons in custody, and of the several executions with which they are charged; and this he must do out of necessity, for there being nobody to inform him, he must himself take notice hereof at his peril. [By stat. 3 Geo. 1. c. 15. § 8. the duties of the office of sheriff are, in this case, to be executed by the under-sheriff, until a successor is appointed. And it is not usual to appoint a new sheriff till the end of the year.]

2 Lev. 109. *J. S.* being in execution in the *Fleet*, was suffered to make a voluntary escape, after which he returned again to the *Fleet*; and the defendant being made warden in the place of the former warden, *J. S.* was turned over with the other prisoners, and afterwards suffered to escape; and the question was, Whether the voluntary escape suffered by the former warden did not so entirely discharge the execution, that the prisoner could not be retaken, nor judged in execution, by law, even though he should yield himself to it? And it was held, that it did not, and that the succeeding warden should be chargeable with the escape suffered in his time. Hob. 202. (*ante C*) *cont.* denied to be law.

6 Mod. 183. So, in the case of one *Grant*, who being in the custody of the former marshal was suffered by him voluntarily to escape, after which he returned voluntarily to prison, and being found in prison, the succeeding marshal detained him; and in an action of false imprisonment brought by him, the court held that he might, and that if he had suffered him to go at large, it would have been an escape. Grant v. Southers. Stra. 423.

2. Where Sheriffs, Wardens, &c. their Superiors or Deputies, are liable, at the Election of him who is injured by the Escape.

(a) But in what cases at common law, and upon the Statute of Westm. 2. Where one hath the custody of a gaol of freehold or inheritance, and commits it to another person, who is insufficient, the (a) superior is answerable for all escapes suffered by his inferior; but if the inferior be sufficient, the action must be brought against him, and not against the superior.

c. 11. the rule of *respondent superior* will hold, vide 2 Inst. 382. 466. 9 Co. 98. 2 Jon. 60. 2 Lev. 158. Vent. 314. 2 Mod. 119. Holt. pl. 11. 3 Keb. 591. 656. 701. 754. 758. 773. Noy, 69. Comb. 95.

Also, by the 8 & 9 W. 3. c. 26. it is enacted, "That the offices of marshal of the *King's Bench* prison, and warden of the *Fleet*, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, lands, tenements, and other hereditaments of the said prisons of *King's Bench* and *Fleet*, or either of them, shall then belong or appertain respectively, in his or their respective proper person or persons, or by his or their
" sufficient

" sufficient deputy or deputies, for which deputy or deputies, and
 " for all forfeitures, escapes, and other misdemeanors in their
 " respective offices by such deputy or deputies permitted, suffered,
 " or committed, the said person or persons in whom the aforesaid
 " inheritances respectively are, or shall then be, shall be answer-
 " able, and the profits and aforesaid inheritances of the said feve-
 " ral offices shall be sequestered, seised, or extended to make satif-
 " faction for such forfeitures, escapes, or misdemeanors respective-
 " ly, as if permitted, suffered, or committed by the person or
 " persons themselves, or either of them, in whom the respective
 " inheritances of the said prisons shall then be *."

* Note :
 By 27 G. 2.
 c. 17. the
 power of
 appointing
 the marshals
 of the
 King's
 Bench is
 revented in
 the crown.
 2 Brownl.
 50. per to-
 tam cur.

If the (a) bailiff of a franchise suffer an escape and be insuffi-
 cient, the lord of the franchise shall answer for him.

2 Lev. 160. S. P. (a) If his deputy suffers an escape, he shall answer for it himself. Lit. Rep. 33. per curiam.

If a gaoler, who is the sheriff's servant, suffers a prisoner to
 escape, the action must be brought against the sheriff, not (b)
 against the gaoler; for an escape out of the gaoler's custody is by
 intendment of law an escape out of the sheriff's custody, for by
 the 13 E. 3. c. 10. sheriffs are to put in such keepers of gaols as
 they shall answer for.

2 Lev. 159.
 2 Jon. 62.
 2 Mod. 124.
 (b) *Id.*
 5 Mod. 414.
 416. Ld.
 Raym. 424.
 Salk. 272.

pl. 2. where it is said in general, that gaolers are liable for escapes; but the question being there touching
 the escape of a person committed for a criminal offence, must be understood of escapes in those cases, for
 which whoever *de facto* occupies the office of gaoler is liable to answer; nor is it material, whether his
 title to the office be legal, or not. Hale P. C. 114. 2 Roll. Rep. 146. 2 Hawk. P. C. c. 19. § 28. & *vide*
 Hard. 29 to 35., that where actions for escapes are said to lie against gaolers, such absolute gaolers are
 intended, as writs are directed to.

So, an arrest by the sheriff's officer is in judgment of law the
 (c) same as if the arrest were by the sheriff in person; and if such
 officer suffer the party arrested to escape, the action must be
 brought against the sheriff.

5 Co. 89.
 Roll. Abr.
 94. (c) Al-
 though in
 law the cus-
 tody of the

bailiff be the custody of the sheriff; yet the sheriff cannot return, that such a one was in his custody,
 and rescued out of the custody of his bailiffs, because of the repugnancy; but he may return, that he
 was rescued out of his own custody, although he was never in his actual custody, or out of his bailiff's
 custody. 3 Salk. 586. pl. 2. & *vide* Sid. 332. 2 Jon. 197.

But if the sheriff directs his warrant to his bailiff, and afterwards
 J. S. puts in his own name as special bailiff, and thereupon arrests
 the defendant, who escapes; here J. S. shall be only chargeable,
 and not the sheriff, because the defendant was never in the sheriff's
 custody, but only in the custody of J. S.

Cro. Eliz.
 745. Dalt.
 Sheriff, 560.
 [It hath
 been repeat-
 edly holden,
 that where

a special bailiff is appointed on the nomination of the plaintiff in the action, the sheriff is not answer-
 able for the acts of such bailiff. De Moranda v. Dunkin, 4 Term Rep. 120.]

So, if a writ comes to the sheriff, and he makes out his mandate
 to the bailiff of a liberty, who takes the party, and after suffers
 him to escape, (d) an action lies against the bailiff of the franchise,
 and not against the sheriff.

Roll. Abr.
 98, 99. Bro.
 Escape, 40.
 Noy, 27.
 [(d) And if
 the bailiff

in such case remove the party to the county gaol situate out of the liberty, and there deliver him into
 the custody of the sheriff, he will subject himself to an action for an escape. Boothman v. Earl of
 Stry, 2 Term Rep. 5.]

Cro. Eliz.
26.

So, where a *capias ad satisfaciend.* was awarded to the sheriff of *Berks* to arrest *J. S.* who then was in custody of the mayor and burgesſes of *W.* and thereupon the sheriff made a warrant to the mayor, &c. to take him, and afterwards they let him escape; it was clearly held, that the mayor, &c. and not the sheriff, were chargeable with the escape.

Roll. Abr.
806. Dunn
and Patie.
Sid. 318.
S. P.

If a *capias* issues against *A.* out of the sheriff of *London's* court, directed to one of the serjeants, who arrests *A.* and lets him escape before he is carried to the counter, the serjeant, in this case, and not the sheriff, is chargeable with the escape; for the sheriff is judge of the court, and not a ministerial officer. But if *A.* had been carried to the counter, and escaped thereout, the sheriff would then have been answerable, as gaoler or keeper of the counter.

Roll. Abr.
806.

So, if a serjeant at mace arrest a man by virtue of a warrant issuing out upon a *latitat*, and afterwards suffer him to escape before he brings him to the counter; in this case, an action lies against the sheriff only for this escape, because he was in the custody of the sheriff presently upon this arrest; and the sheriff is the officer of the court of *King's Bench*, and not the serjeant.

Cro. Eliz.
743. Baldry
v. Johnson,
adjudged.

If upon a plaint levied in the court of *B.* before the bailiffs of *B.* according to the custom there, a warrant is directed to the under-bailiffs, to take *J. S. ita quod habeant corpus ejus coram ballivis ad prox. curiam*, and the under-bailiffs take him and commit him to the prison *sub custodia* of the gaoler of the prison of *B.*; if they have him not at the day, &c. an action lies against them, and not against the gaoler; for there was no commitment to him by any lawful authority, and that custody the gaoler had was only as a servant to the under-bailiffs.

Carth. 145.
Ryding and
Edwin.

A prisoner in *Wood-street Counter*, upon a mesne process on a plaint levied against him, &c. escaped, whereupon the plaintiff brought his action against both sheriffs of *London*; and, upon a demurrer to the declaration, the plaintiff had judgment; and it was resolved, that though the plaint was levied before one of the defendants only, and the prisoner escaped out of his counter, and by his negligence alone, yet that both sheriffs had the custody of the prisoners in both counters, and by consequence, the action was well maintainable against both.

Cro. Eliz.
625. Benion
v. the She-
riff of the
City of
York.
(a) That

If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and (a) merely personal, the party can only have remedy against the survivor*.

(a) That no action lies against the executor or administrator of a person who suffers an escape, because it is a personal tort, and comes within the rule *actio personalis moritur cum persona*, vide *Dyer*, 271. 322. *Jon.* 173. *Noy*, 87. *Latch.* 167. *Poph.* 187. *Vent.* 21. 6 *Mod.* 125-6. — * By 8 & 9 W. 3. c. 11. § 7. the death of one plaintiff or defendant, where there is another surviving, not to abate the suit.

3. Where the Party injured may have his Remedy against the Person escaping, and therein of Escape Warrants.

It has been already observed, that if the sheriff suffers the prisoner voluntarily to escape, the party at whose suit he was in custody may, notwithstanding, sue out any new execution against the person escaping; for it would be unreasonable that he should be allowed to take advantage of his own act, or that the creditor should be compelled, whether he will or no, to take his remedy against the sheriff, who may die or become insolvent*.

* It is put out of doubt by the stat. 8 & 9 W. 3. c. 26. which vide ante.

Therefore, where to a *scire facias quare executionem non* upon a judgment the defendant pleaded, that he was formerly taken in execution by a *capias ad satisfac.* upon the same judgment, and the sheriff suffered him to escape, to which escape the plaintiff then and there consented; this was held an ill plea; for the assent (a) subsequent will not make it an escape with the consent of the plaintiff, and therefore he has either his remedy against the sheriff, or may retake the party.

Salk. 271. pl. 1. Scott and Peacock. (a) Show. 174. S. P. adjudged on the like plea.

But if (b) a man in execution upon a judgment for debt or damages be delivered out of execution by the sheriff or gaoler who hath him in execution, with the (c) assent of him at whose suit he is in execution; and after by colour of this judgment he take him again and put him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered.

Roll. Abr. 307. Welby and Andrews, adjudged. (b) So, if the plaintiff consent

that one defendant only shall be delivered out of execution. Style, 387.—So, if he consent that one of the bail shall be delivered out of execution, he shall not take the other. 2 Leon. 260. (c) Where the consent was only, that he should come to a tavern out of the rules. Style, 117.—Where one was in execution in the King's Bench, and some proposals were made to the plaintiff in behalf of the prisoner, who seeing there was some likelihood of an accommodation, consented to a meeting in London, and desired the prisoner might be there, who came accordingly; this was held to be an escape with the consent of the plaintiff, and he could never after be in execution at his suit for the same matter.

[In an action against the warden of the *Fleet*, for an escape on mesne process, a verdict was given for the plaintiff with 300 *l.* damages. The facts of the case were as follows:—The plaintiff had recovered against one *Fakeney* a debt of 11,000 *l.*, but at the time of the escape, a writ of error was pending, and final judgment not entered up. On *Friday* the 24th of *November* last, the deputy warden of the *Fleet* (the warden himself being not in town) received a notice in writing (which notice it was in proof was duly served) from the plaintiff, to discharge *Fakeney*. The deputy warden having some doubts whether the notice were really the handwriting of the plaintiff in the suit, and those doubts being increased by its having been brought by one *Knight*, a man of very bad character; he did not immediately obey it, but employed himself in inquiring into the matter, and endeavouring to discover whether this were actually the handwriting of the plaintiff, or not. On the *Saturday*, the next day, he met the plaintiff's attorney, who told him, he was not enough acquainted with plaintiff's handwriting to be able to give any opinion on it. On the following day, *Sunday*, in the afternoon, he met the plaintiff and his attorney; the plaintiff then

Holland v. Eyles, C. P. M. 28 G. 3. MSS.

acknow

acknowledged that the notice which defendant had received was written by him, but after some conversation, swore that he had been made a dupe of in giving it, and immediately served the defendant with a countermand of it. The defendant disregarded this countermand, and that evening discharged *Fakeney*. Lord *Loughborough's* idea at the trial was, that this first notice could amount to nothing more than merely to entitle *Fakeney* to a *super-fetas*, that it by no means warranted an immediate discharge, and therefore as the defendant had taken upon him to judge of the legal effect of it, he thought he ought to take the consequences, and told the jury that they should find for the plaintiff.

Bond, Serjeant, moved, that a nonsuit should be entered upon the above evidence as it appeared on the judge's notes. He insisted, that by the letter of discharge all claims by the plaintiff on the defendant for the detention of *Fakeney* were put an end to, and that that letter of discharge could not be countermanded. For in the first place, this notice from the plaintiff was a legal discharge: a parol direction to the gaoler by the plaintiff in the suit, to let the prisoner go out of prison, is a good discharge, *Brown Anal.* 29.; and such direction is a good defence by the gaoler in an action for an escape. 2 *Inst.* 382. Lord *Coke*, commenting on the words *sine assensu domini*, says, this assent may be by parol, and shall be a sufficient bar in an action of debt for the escape. *Dy.* 275. a. *Cro. Car.* 329. *Vezey v. Harris* and wife, *Gouldf.* 81. These cases prove, that where there is the consent of the plaintiff, a discharge without writ is a sufficient defence in an action against the gaoler for an escape. But this order of discharge having been thus properly given, could not in law be countermanded. To see whether it were countermandable or not, it will be necessary to see what was to be its operation on the prisoner. As with respect to him, it was a grant of liberty, a grant of an interest of the highest nature, and therefore not countermandable. For wherever a valuable interest is given by grant or manumission, it cannot be countermanded. A villein enfranchised for an hour, is so for ever; an express manumission of a villein cannot be upon condition, for once free in that case, and ever free. *Ca. Litt.* 274. b. *Finch.* 29. The law invariably makes the distinction between matters of profit or interest, and matters of pleasure, ease, trust, authority, and limitation; with respect to the former it allows of no countermand; with respect to the latter, they may be countermanded, though a power of revocation be taken away in the most positive terms, for a man cannot by his own act make that not countermandable, which by law and in its nature is countermandable. This was settled in *Viner's* case, 8 *Co.* 82., where it was determined that a submission to an award is revocable, though the party have declared it to be irrevocable; but the grant of a valuable interest is in its nature irrevocable. *Sheph. Abr.* tit. *Countermand*, 464. If I present *J. S.* to a church, I cannot after vary and present anew, for a kind of interest passeth out of me. *Finch.* 32. *Dyer*, 348. a. In *Plowd.* 36. a. it is stated *arguendo*, that if a person a thing

thing be once in suspense, or the person of a man be once discharged for a personal thing, that is a discharge for ever. From all these authorities then it is clear, that where a valuable interest is derived to a party, it is not subject to a countermand. And further, by this order of 24th of November, *Fakeney* can never be deprived of his liberty again for this debt. It is said in the case of *Alanfon v. Butler*, cited in *Show. 177.* that in an escape by consent of plaintiff, neither the plaintiff nor the sheriff can retake, though the debt be unsatisfied. And in *Freem. 213.* in the case of *Basset v. Salter*, North, C. J. says, Since the law is so strict that matters of deed shall not be discharged but by deed, he wondered that the law should permit an execution to be discharged by a mistake of the plaintiff's; as he cited a case, where a creditor went over to the *King's Bench* to treat with a prisoner, and brought him over the water to a tavern to treat, it was held that he could never take him again, and so the law is clear when he is once discharged by the consent of the plaintiff. S. C. in 2 *Mod. 136.* These words ought to have the more weight, because the C. J. seems to express a dissatisfaction in declaring the law to be so settled. But when this order was delivered to the warden, he was bound to obey it, otherwise he would have been guilty of a trespass, and he actually was guilty of one, in detaining *Fakeney* till the Sunday. That the action of trespass will lie in this case is determined in 3 *Bulstr. 96. Withers v. Henly.* But if the defendant is chargeable in an action at the suit of *Fakeney* for detaining him, he cannot be chargeable in an action at the suit of *Holland* for discharging him.

On the other side it was answered by *Adair*, Serjeant, that as to the first set of cases which were cited by the council for the defendant, and which went to prove that an interest once granted cannot be revoked; admitting that position to be true, yet liberty is not the interest meant in those cases; all those cases relate merely to property. That as to the case that was cited from *Freem. 213.* and 2 *Mod. 136.* in the second set of cases, which struck the court as pressing rather hard upon the plaintiff, where it was held, that if a creditor had once taken his debtor out of prison, though for the express purpose of a compromise, he could not afterwards detain him; in that case it should be considered that there was an actual discharge, not as in this, a mere assent to a discharge. There is another distinction, which was exceedingly material; and that is, between a party in prison under an execution, and under mesne process; execution is much more like an interest than a detention under mesne process; for the discharge of the party under mesne process by no means annihilates the debt; for the creditor, though he cannot arrest the debtor again, yet he may sue him for the debt, and then take him in execution.

An authority to a gaoler to discharge a prisoner on mesne process is merely a licence not coupled with an interest, therefore may be countermanded.

2y. A case
cited from
2 Roll. 39.

Lord *Loughborough*.—The point made at the trial was this, that a discharge once given, no matter by what means obtained, whether by fraud or fairly, was irrevocable? I did not leave it to the jury to inquire whether there had been any fraud used in obtaining the discharge, but summed up the evidence without adverting to that part of the case. I thought the counsel extremely judicious in not pressing upon that ground, as I was strongly of opinion that the plaintiff had been grossly imposed upon, and should most certainly have summed up to the jury with very strong observations. The question therefore now comes before the court, bearing as an admitted fact upon the face of it, that the plaintiff had been duped, and therefore it is for the defendant's counsel to contend that the original order of discharge was effectual, notwithstanding the discharge had been obtained on the ground that the plaintiff had been duped.

The defendant's counsel, after some hesitation, confessed that if the case were put upon that ground, they should be unable to support it, and not choosing to let the whole go again to a jury, the rule was discharged.]

[(a) The escape warrant not grantable for any contempt but not performing an order. *Hincheliffe v. Payne*, 1 Str. 99.]
 (b) If a person charged in execution in the King's Bench be turned over to the Fleet, and he escape, either a judge of the King's Bench or Common Pleas may grant an escape warrant. *Pasch. 10 Geo. 1. The King and Dunbar*.
 [And by 5 Ann. c. 9. § 2. the warrant may be granted on an affidavit made in the country before a commis-

By the 1 Ann. c. 6. it is enacted, "That if any person committed [or rendered to, or charged in the custody of the marshal of the *Queen's Bench* for the time being, or to or in the prison of the *Fleet*, either in execution, or upon mesne process, or upon any contempt in not performing orders or decrees (a) made by any of her majesty's courts at *Westminster*, and such person shall at any time after such commitment, render, charge, or bring in execution, and before he shall have made payment or satisfaction to plaintiff or plaintiffs, creditor or creditors, or shall have cleared himself of such contempt, as he shall be charged with at the time of such commitment, &c., make any escape] from the custody of the marshal of the *Queen's Bench* for the time being, or from the prison of the said *Queen's Bench*, or from the prison of the *Fleet*, or either of them, it shall and may be lawful, upon oath thereof in writing, to be made by one or more credible person or persons, before any one of the judges of (b) that court where such action was entered, or judgment and execution were obtained, or where the party was so committed or charged as aforesaid, to and for such judge before whom such oath shall be made, as aforesaid, and such judge is hereby authorized and required from time to time to grant unto any person whatsoever, who shall demand the same, one or more warrant or warrants under his hand and seal, therein reciting the action or actions, execution or executions, contempt or contempts, with which such person so escaping or going at large, stood charged, or was committed, at the suit of any person or persons on whose behalf such warrant or warrants shall be demanded, at the time of such escape or going at large, (which warrant or warrants shall be in force in all places whatsoever within that part of *Great Britain* called *England*), directed to (c) all sheriffs, mayors, bailiffs, constables, headboroughs, and tithingmen, therein and thereby commanding them

" and every of them in their respective counties, cities, towns, and
 " precincts, to seize and (d) retake such person or persons (e) so
 " escaped or going at large; and such person or persons, so re-
 " taken upon such warrant, forthwith to convey and commit to
 " the common gaol of such county (f) where such person or per-
 " sons so escaped or going at large shall be retaken, there to re-
 " main without bail or mainprize, or being thence (g) upon any
 " account whatsoever delivered or removed until he, she, or they
 " shall have made full payment or satisfaction to the respective
 " plaintiff or plaintiffs, creditor or creditors, in such action or
 " actions, execution or executions, named, or until the judgment or
 " judgments on which such execution or executions was or were
 " sued out against such person or persons shall be reversed or
 " discharged by due course of law, or until judgment in such
 " action or actions be given for such person or persons so com-
 " mitted as aforesaid, or until the contempt or contempts for
 " which such person or persons were or shall be committed be
 " cleared and discharged," &c.

tioner, such
 affidavit be-
 ing first duly
 filed.]
 8 Mod. 240.
 ruled on
 motion.
 (c) If one
 who is no
 officer, by
 virtue of the
 warrant,
 seise a per-
 son escaping,
 and bring
 him before
 the sheriff,
 he cannot
 detain him;
 for, being
 illegally
 executed, it
 is the same
 thing as if
 there had

been no warrant at all. 6 Mod. 154. [(d) By 5 Ann. c. 9. § 3. escape warrants may be executed on
 a Sunday.] (e) If a person is taken upon an escape warrant at eight in the morning, and he same day
 obtains a day-rule, pursuant to a petition, which was not read in court till after eight, yet he shall be
 discharged; for as to this purpose there shall be no traidion of a day. Trin. § Geo. 1. Wilkinson and
 Matthews. 8 Mod. 80. [(f) By Stat. 5 Ann. c. 9. § 1. persons taken by virtue of, 1 Ann. c. 6.
 instead of being committed to the common gaol of the county where they are taken, are to be committed
 to the prison where the sheriff keeps prisoners for debt, from which, if they escape, the sheriff shall be
 answerable as in other cases of escape.] (g) Cannot be discharged upon bringing the money into court.
 6 Mod. 21. — Cannot come out on a day-rule 6 Mod. 63. — [The warrant shall be superseded, if
 the party was entitled to his discharge at the time he escaped. Webb v. Thompson, 1 Str. 401.]

(F) Of the proper Remedy and Nature of the Action to be brought for an Escape.

A common law the plaintiff had no remedy against the sheriff
 for an escape, whether upon mesne process, or in execution,
 but by special action upon the case. 2 Inst. 382.
 Show. 176.
 2 Saund. 34.
 Hard. 30.

But now, by an equitable construction of *Westm. 2. c. 11.*
 (b) action of debt is given against sheriffs, and by the 1 *Rich. 2.*
c. 12. against the (i) warden of the *Fleet* for escapes of prisoners
 in execution. (b) This
 action being
 founded in
maleficio, and
 and also
 given by

statute, is not within the statute of limitations of 21 Jac. 1. c. 16., which speaks of debts arising by
 lending or contract. Saund. 34. Jones and Pope, adjudged. Sid. 305. and Lev. 191. S. C. adjudged.
 (i) Extends to all gaolers and keepers of prisons, though infants, or feme covert. 2 Inst. 382.

Also, the plaintiff, at his election, may maintain either an action
 upon the case, or debt, for an escape in execution. Cro. Jac.
 288.
 2 Bulst. 121.

Cro. Eliz. 767. [If he adopt the latter, the jury *must* give him the whole sum, that is, the whole which
 he would have been entitled to have recovered against the prisoner, viz. the sum indorsed on the writ,
 and the legal fees of execution. Bonafous v. Walker, 2 Term Rep. 126. Hawkins v. Plomer,
 2 Bl. Rep. 1048. But see the words of Buller, J. in 5 Term Rep. 40. Debt lies as well where the
 escape is negligent, as where it is voluntary. Stonehouse v. Mullins, 2 Str. 873.]

If there be judgment against baron and feme, and the feme only
 taken in execution, and suffered to escape, an action of debt lies
 against Cro. Jac.
 657.
 Whiting v.

Sir George
Reynel.

against the marshal; for as the plaintiff may elect to take either the husband or wife in execution, so by his election he has made her a sole debtor within the statute of R. 2. although it was objected that it should be case, because the party is not totally deprived of his remedy, the husband being still liable.

Cro. Jac.

361. 533.
619. Cro.
Eliz. 877.
[1 P. Wms.
685.] S. P.
adjudged.
capiendo. Lut. 123.

If a prisoner in custody upon a (a) *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him in his own right.

(a) So, an action on the case will lie for the escape of one taken upon a writ *de excommunicato capiendo*. Lut. 123.

(b) Dyer,
278. b.
adjudged,
& vide
2 Jon. 144.

An action of escape is not a local action, and therefore (b) if one escapes out of the *Marsbalsea*, which is in *Surry*, the action against the marshal may be laid in *Middlesex*.

Sid. 364. S. C.

[By stat. 1 Ann. c. 6. § 2. "If any person so retaken by warrant as aforesaid, shall at any time make any escape out of the gaol to which he shall be conveyed or committed as aforesaid, the sheriff, in whose custody he was, shall be liable to answer for such escape, as in the case of any other escape."

By § 3. "It shall be lawful for any person or persons that shall be bail in any of her Majesty's courts of record at *Westminster*, for any such person that shall be retaken and conveyed to such gaol, by virtue of such warrant as aforesaid, to have and procure a writ out of such of her Majesty's courts where he or they shall be bail, a writ directed to the sheriff of the county, to the gaol whereof such prisoner so retaken shall be committed and detained, commanding him to detain and keep such prisoner in custody in discharge of his bail; which writ, with an account whether he hath the said prisoner in his custody, shall be returned by the said sheriff into court, at a day therein to be mentioned; and the delivery of every such writ to the sheriff, or his deputy, shall be deemed and taken to be an effectual render of such prisoner to all intents in discharge of the said bail; and in case such sheriff, his deputy, or other his inferior officer, shall thereafter suffer the person so rendered in discharge of his bail to escape, they and every of them so offending shall be liable to action and actions as the marshal of the *Queen's Bench*, or warden of the *Fleet prison*, is or are liable to, for permitting any person to escape out of his or their custody or prison, who was committed to such custody or prison upon render in discharge of his bail."

It is enacted by stat. 5 Ann. c. 9. § 4. "That if any person shall be in custody of any sheriff, or other officer, either by virtue of the above statute of 1 Ann. or of this present act, or otherwise, for not performing any decree of the high court of Chancery, or court of Exchequer, whereby any sum of money is ordered or decreed to be paid, and shall afterwards make any escape from the said sheriff or other officer, then and in such case the person, his executors or administrators, to whom the

" money was to be paid by the said decree (a), shall have the same
 " remedy against the said sheriff, as if such person so escaping
 " had been in custody upon an execution at law, and shall and
 " may recover the sum of money decreed to be paid in and by
 " such decree, against such sheriff or other officer, together with
 " his or their costs of suit, in any action of debt, or upon the
 " case, to be brought or commenced against such sheriff or other
 " officer in any of her Majesty's courts of record at *Westminster*,
 " wherein no protection or wager of law shall be admitted, or
 " any more than one imparlance."

(a) If in a suit by husband and wife, it appears by the decree that the wife is interested in the case, she ought to join with her husband in the action, not-

withstanding the order should appoint the money to be paid only to the husband. *Huggins v. Durham*, 2 Str. 726.

By 5 G. 2. c. 30. § 18. a penalty of 500 l. is inflicted on gaolers suffering bankrupts to escape.]

(G) Of the Manner of laying the Action.

IN this action it is not necessary to set forth all the (b) formalities required by law in other cases.

Cro. Eliz. 877.
 (b) Vide 2 Show. 424. pl. 391.

Therefore if, upon a judgment obtained by the testator, the executor brings a *scire facias*, and has judgment, whereupon a *capias ad satisfac.* issues, and B. is arrested, and suffered to escape, the plaintiff in an action against the sheriff for this escape may declare briefly upon the judgment in the *scire facias*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment.

Carth. 148.
 Good and Strode.
 3 Mod. 324.
 S. C.
 Cro. Eliz. 877. S. P. adjudged.

But if the plaintiff declares, that he sued out a writ of execution against J. S. without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means he lost the benefit of pleading *nul tiel record* (c), which he might do, if the plaintiff had set forth the judgment.

Saund. 37.
 38. Jones and Pope.
 Lev. 191.
 and 1 Sid. 306. S. C. but the Drury's case.

plaintiff had leave to discontinue. (c) 8 Co. 142.

If A. recovers as executor against B. and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the (d) *detinet* only, and not in the *debet* and *detinet*.

Lutw. 893.
 Glover and Kendal, adjudged, Combs. 124.
 S. C. ad-

judged. [But see *Bonafous v. Walker*, 2 Term Rep. 126. *contra.*] (d) For this vide 5 Co. 31. Hargrave's case. Cro. Jac. 545. Hob. 204. 3 Bulst. 112. Lan. 79. Savil, 150.

Co. 31. Har-

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say *prout patet per recordum*; yet upon a general demurrer this shall be good; for the gist of the action was the escape, and the commitment only inducement.

2 Saik. 565.
 pl. 1.
 Waits and Briggs.
 5 Mod. 8. S. C. & vide 3 Lev. 397.

If in escape the plaintiff declares, that he had J. S. and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture), and that

Sid. 5.
 Roberts and Herbert, adjudged.

(c) As where a man assigns, for breach of a condition, that he was turned out of his house by two, and the jury find that it was done by one only. Cro. Jac. 475. Hingen and Pain, adjudged.

Cro. Jac. 380. King v. Andrews, adjudged. Sid. 5. S. C. cited. So, in an action on the case for the escape of *A.* where the jury found that *A.* was taken by *J. S.* the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment.

2 Lev. 85. Gunter and Cleyton. [4 Term Rep. 611. Alexander v. Macauley, S. P.] The plaintiff declared, that whereas he had good cause of action against *A.* and sued out a *latitat* against him; the defendant being sheriff arrested him, and suffered him to escape; upon trial at *nisi prius* the plaintiff was nonsuit, because he could prove no cause of action against *A.*; but *Hale*, Ch. Just. said, that if the plaintiff had declared of a debt of 40 *s.* and upon evidence could prove but 30 *s.* it had been sufficient; but the book adds a *quare*, it being a special action upon the case.

Blatch v. Archer, Cowp. 63. [In debt against the sheriff for an escape, the indorsement of *non est inventus* upon the *capias ad satisfaciendum*, is sufficient evidence of its having been delivered to him. So, the bailiff's name indorsed on the writ is sufficient evidence, that he was authorized by the sheriff to arrest, without proving the warrant.]

By the 8 & 9 W. 3. c. 27. reciting, that the way of proceeding against the warden of the *Fleet* prison, by bill in the courts of Common Pleas and Exchequer at *Westminster*, is found to be very dilatory; it is enacted, "That it shall and may be lawful to and for any person or persons, having cause of action against the warden of the *Fleet* prison, upon bill filed in the said courts of Common Pleas or Exchequer against the said warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the said warden of the *Fleet*, unless he plead to the said bill within three days after such rule is out."

(H) Of the Party's Defence who suffered the Escape: And herein of pleading fresh Suit.

3 E. 6. 66.
15. Roll.
Abr. 808.

IF the prison takes fire, by means whereof the prisoners escape, this shall excuse the sheriff, and he may plead it.

4 Co. 84.
Roll. Abr.
808.

So, if the prison is broken by the king's enemies, this shall excuse the sheriff, for he can have no remedy over against them.

4 Co. 84.
Roll. Abr.
808.

But if the prison was broken by rebels and traitors, the king's subjects, this shall not excuse him, for he may have his remedy over against them.

Cro. Jac. 657.
Jon. 144.
Roll. Abr.
808.

If a prisoner in execution escape without the assent of the sheriff, &c. and he make fresh pursuit and retake him (*b*) before any action brought against him, this shall excuse the sheriff.

[And a voluntary return of the prisoner, before action brought, is equal to a retaking upon fresh

fresh pursuit. *Bonafous v. Walker*, 2 Term Rep. 126.] (b) But if he retake him after the action commenced against him, this shall not excuse him; nor can it be pleaded to an action that was well attached before. Roll. Abr. 808, 809. Jon. 145. Cro. Jac. 657. *Harvey and Reynell*, adjudged. [2 Str. 873. *Stonehouse v. Mullins*, S. P.]

So, the sheriff may plead, that the prisoner escaped the sixteenth day of *December*, and that he made fresh suit, and retook him the seventeenth day of *December*, and retained him in execution; for it is sufficient, if he did all he could, though he lost sight of him in the night, or otherwise.

So, if a prisoner escapes, and several days after, but as soon as the sheriff has notice of it, he makes fresh suit, and retakes him before any action brought, this shall excuse him.

If in debt upon an escape the plaintiff sets forth in his declaration a voluntary escape, the defendant may plead that he took him upon fresh pursuit, without traversing the voluntary escape; for it was impertinent for the plaintiff to allege it, and no ways necessary to his action.

Walker, S. P. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Ibid.*]

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it.

But now by the 8 & 9 W. 3. c. 27. § 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence on the trial of any issue in any action of escape against the marshal or warden, or their respective deputy or deputies, or against any other keeper or keepers of any other prison or prisons, unless the same be specially pleaded; nor shall any special plea be taken, received or allowed, unless oath be first made in writing (c) by the marshal or warden, or their respective deputy or deputies, or by such other keeper or keepers of any other prison or prisons against whom such action shall be brought, and filed in the proper office of the respective courts, that the prisoner for whose escape such action is brought, did, without his consent, privy, or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the marshal or warden, or other keeper or keepers of any other prison or prisons, shall be convicted thereof by due course of law, such marshal or warden, or other keeper or keepers of any other prison or prisons, shall forfeit the sum of 500 l."

affidavit that an escape has actually happened. *West v. Eyles*, 2 Bl. Rep. 1059.]

If an action of escape be brought against the sheriff, and the judgment upon which it is found be reversed, before such time as the defendant is forced to plead, he may plead (d) *nul tiel record*, for (e) collateral things executory are as if no judgment had ever been, when reversed.

capias ultagatum, the sheriff may plead *nul tiel record*. *Hob.* 209. *Brownl.* 51. (e) But if, in debt, upon escape, the plaintiff recovers, and hath execution, and after the first judgment is reversed, yet the judgment for the escape remains in force. 8 Co. 142. b. 3 Mod. 325. S. C. cited.

Roll. Abr. 809. Dalt. Sheriff, 562.

Roll. Abr. 809. See 3 Co. 52. Vide Ent. 195. 193.

Vent. 211. 217. Sir Ralph Bovy's case. [2 Term Rep. 126. *Bonafous v.*

Vide Mod. 116. Sid. 13.

[(c) An affidavit that the escape mentioned in the declaration, (if any such escape there was,) happened without the defendant's knowledge, was allowed to be sufficient; for, if the defendant knows nothing of any escape, he is not to be bound to admit by his

8 Co. 142. Dalt. Sheriff, 563. (d) In debt for an escape of one committed on a

For this
vide Cro.
 Eliz. 404.
 Mod. 194.
 2 Jon. 97.
 Lut. 587.
 Ld. Raym.
 399.

* Yet, *qu.*
 If the court,
 on motion,
 farther?

If a prisoner taken on a *capias ad satisfaciendum* pays the debt to the marshal for the use of the plaintiff in the original action, and is thereupon discharged, yet he cannot plead it to an action brought against him for the escape; for the marshal had no authority to receive the money, the words of the writ being *quod capias, &c. et eum salvo custodias ita quod habeas corpus ejus coram justiciis*. tiel jour *ad satisfaciendum* the plaintiff*.

Estate in Fee-simple.

(a) It was a
 common
 practice
 among the
 Northern
 nations that
 invaded the

Roman empire, for the lords, who held great districts, to give lands to such persons as had behaved themselves well in the wars, sometimes for life only; and when they married their daughters to any of those soldiers who were usually their vassals or tenants, they gave the lands to them and the issue of that marriage, which brought in the notion of succession amongst us. Dig. lib. 1. tit. 1. How from this notion of succession a fee-simple arose, by letting in all heirs, whether lineal or collateral, of the exclusion of the ascending line, bastards and the half blood, and why the male line was preferred, *vide* title Descents, *ante*. (b) My Lord Coke divides *fee*, which he says signifies the same with inheritance, into fee-simple or absolute, conditional and qualified, or base. Co. Lit. 21. b.; and this, which is the most ample estate of inheritance, may be in things (c) *real, personal, or mixed*; real, as in lands or tenements; personal, as when an annuity is granted to one and his heirs; mixed, as when an earl is created of such a county. Co. Lit. 1. b. 2. a.

In Fee-simple we shall consider,

(A) Who may purchase or inherit such Estate.

(B) The Import of the Word *Heir* that creates the Estate.

1. When it is a Word of Limitation.
2. When it is a Word of Purchase.

(A) Who

(A) Who may purchase or inherit such Estate.

AN alien cannot purchase any lands in *England*; the reason is, because every person is presumed to have a natural and necessary allegiance to that society that first protected and preserved him; and therefore he cannot pay any allegiance to any other society, unless he be afterwards received into it.

Vau. 227.
291. 7 Co.
16, 17, 18.
Dyer, 2.
pl. 8.; but
for this *vide*
head of Aliens.

All persons attainted of treason or felony are incapable of purchasing. Felony, by the ancient feudal law, was a (a) crime for which a vassal forfeited his feud to the lord, because he broke his oath of fealty in the highest manner: his body with which he had engaged to serve the lord is forfeited to the king; and his blood is said to be corrupted, because no man can represent his person, that person itself being forfeited by the law, and the note of infamy resting upon his family; so that no representative of his can be received to do any feudal service: such tenant, therefore, dying without heirs, the land is in the lord by forfeiture. But if the tenant commits treason, the lands are forfeited to the king, because there is an exception in the oath of fealty that saves his allegiance to the king; so that if he forfeits his allegiance, even those lands held of another lord are forfeited to the king, for the lord himself cannot give out lands, but upon that condition, as appears by the reservation in the oath.

(a) Co. Lit.
8. a. of
such crimes
there were
many by the
ancient feo-
dal law, for
which *vide*
Digest. Feu-
dorum,
lib. 2. tit.
23, 24.
Vigellius,
242. 350.
Spelm.
Gloss. 214,
215. Co.
Lit. 64.

If a man be attainted of felony, and after purchase land, and die, the king shall have it by his prerogative, and not the lord of the fee; because his person being forfeited to the king, he cannot purchase but for the king.

Co. Lit.
2. b.

If there be grandfather, father, and son, and the father be attainted, the son cannot inherit the grandfather, because the father cannot be represented; but if the father be attainted, two brothers may inherit each other, because there is no disability in the one to be represented, or in the other to represent; if the father be attainted, the son may inherit the mother; if the eldest son be attainted, and the father die in the lifetime of such eldest son, the younger cannot inherit, because there is the line of the elder brother in being before him; but if the eldest son die in the lifetime of his father, without issue, the younger brother shall inherit; but if he leave issue, neither the issue nor younger brother can inherit.

Noy, 153
to 170.
Co. Lit. 8.
4 Leon.
pl. 21.
Mo pl. 775.
Dyer, 48.

If the father be attainted and die during the life of the grandfather, yet the son shall not inherit the grandfather, because he must represent his father, who cannot be represented: but if the grandfather be seised in tail, and the father be attainted of treason since the 26 *H. 8. c. 13.* and die in the lifetime of the grandfather, the son shall inherit the grandfather, for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father only forfeits the lands and right that he hath in him.

Co. Lit. 8.
2 Co. 10.
Dowdies
case.

Co. Lit. 3.
But if a man
be attainted,
and after
pardoned by
charter, the
children
born before

If a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all persons; but if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter the law, or take away the right of others, or restore the relation that was lost.

such pardon shall not inherit; but if they fail, the children born after such pardon may inherit him, for the pardon makes him capable of new relations as well as of new purchases, though all the old legal benefits and relations are lost. Noy, 170.

Pollex. 617.
2 Keb. 451.
436. 2 Vent.
38-9.
2 Brown.
118. vide
Co. Cop.
§ 58. cont.

All customary estates are within this rule, unless there be some particular custom to the contrary, as in gavelkind, because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing: and therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court-baron to inquire of criminal matters or offences against the king, and such homage is at the will of the lord, and often influenced by him: but if a copyholder be convicted of felony, and presented by the homage, by special custom, the estate may be forfeited to the lord; but this is only by the special custom, since the copyholder is not disabled by the conviction to hold the estate, as he is if he were attainted; and therefore, since it is by the custom only that such forfeiture accrues, it must be in the manner in which the custom settled it, which is by presentment of the homage. But if a copyhold is granted for life, and by another copy the reversion is granted to another, *habendum* after the death of the first copyholder, or surrender, forfeiture, or other determination of the first estate, the first copyholder commits murder, and is thereof attainted, and the king pardons the murder and the attainder, and all forfeitures thereby; in this case, he in the reversion is entitled to the estate; for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

Leon. 1.
Pollex. 615
to 621.

Co. Lit.
1 b. 1. but
not this
vide head
of Bastardy,

A bastard cannot inherit, but if he hath got a name by reputation, he may purchase by it, for all surnames were originally acquired by reputation.

As to *Jews*, they were translated from *Roan*, by *William* the Conqueror, *ob numeratum pretium*, and were allowed by several kings following the Conqueror, because they dealt with one another chiefly in money, and so drew a great deal of money into the kingdom, which they let out to Christians on usury, and were taxable to the king at his pleasure. *Richard* the first erected a court where all their real and personal estates were registered; which all, upon the death of any *Jew*, came to the king, but was redeemable by his children, paying their fine, and all the children equally inherited; the wives sued for dower in this court, and could not

Notwithstanding the charters and immunities granted to the Jews, yet their whole estates were taxable at the pleasure of the king, and might at

sue

sue at common law for it; and therefore if a *Jew* born in *England* took to wife a *Jew* also born in *England*, if the husband was converted to the Christian faith, and purchased lands and enfeoffed another and died, the wife could not demand dower at common law against a Christian.

any time be
seised by
him. About
the 18 E. 1.
when their
usuries and
extortions

were very grievous to the people, they were banished by proclamation, and their estates seized to the king, and a statute made against their taking usury in this land, if ever afterwards; but now all the records touching their courts, their immunities, and the power of the crown over them, are lost and obsolete, so that those that are born here seem inheritable at this day; but *quære* how far those old laws, of which there are footsteps in history, may be revived upon them? Hollingshead, vol. 3 p. 15. Co. Lit. 31, 32. 2 Inst. 506, 507. *Vide* Molloy, 397 to 410. a good account of the Jews.—[Jews, it seems, were not incapacitated from taking gifts or land, unless there was an express clause, usual in former times, in the original charter, forbidding an alienation to them. Bract. 13.]

As to papists, there hath been an act made to prevent the dangerous growth of popery, when there was a pretended title in a popish prince, which disables all, who after the 29th day of *September* 1700, attaining the age of eighteen years, do not within six months after take the oaths, &c. to inherit, or take by *descent*, *devise*, or limitation, &c. any lands, tenements, &c. and that during the life of such papist, or until he or she do conform, the next of his or her protestant kindred shall hold and enjoy the said lands, without being accountable for the profits, subject to wilful wastes, and that from the tenth day of *April* 1700, all papists shall be disabled to purchase any manors, lands, &c. and that all estates, terms, interests, &c. made, suffered, or done, to or for their use, benefit, trust, or behoof, mediately or immediately, shall be utterly void to all intents and purposes.

11 & 12 W.
3. c. 4. For
this *enle*
tit. Papists
and Popish
Recusants.

Religious persons are prohibited to purchase in mortmain.

Vide tit.
"Chari-
table Uses and
Mortmain."

Villeins and bondmen have power to purchase lands, but cannot retain them against their lords.

Co. Lit. 2.

As to persons who are naturally incapable to purchase or inherit, a monster not having human shape cannot purchase or inherit: but an hermaphrodite shall inherit or purchase *secundum prævalentiam sexûs incalescentis*. One born deaf and dumb may inherit; so may any born deaf, dumb, and blind, because it is for their advantage; but they cannot contract, because they cannot understand the signs of contracting. An infant, an idiot, and a person of *non sane memory* may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property; so also an infant, or a person of *non sane memory* may purchase, because it is intended for his benefit; and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor, contrary to his own act; nor can it be in abeyance, for then a stranger would not know against whom to demand his right: if at full age, or after recovery of his memory he agree thereto, he cannot avoid it; but if he die during minority or lunacy, the heir may avoid it; for the heir shall not be subject to the contracts of persons who wanted capacity to contract. So,

Co. Lit. 2.

Inst. 2.
2 Vent. 203,
204. *vide*
tit. Infancy
and Age,
and Idiots,
&c.

if after his memory recovered, the lunatic or person *non compos* die without agreement to the purchase, his heir may avoid it.

Inst. 3. a. But the queen consort, as she is a woman of greater dignity than any other of her sex in the kingdom, so she hath greater privileges than any of them, for she is considered by the law as a person exempt from the king, and hath ability to purchase and grant without him;

which economy seems to be introduced as well for the greater ornament and grandeur of the monarchy, by enabling the queen to support and keep a court of her own, as to encourage princes to court the alliance of our princes by marriages attended with so much ease and dignity.

(B) The Import of the Word *Heir* that creates the Estate.

1. When it is a Word of Limitation.

Co. Lit. 9.

IF land be given to *J. S.* and his heirs, *J. S.* can claim it, because he is particularly named, and whoever can make himself heir to *J. S.*, that is, can support the character of a legal representative to *J. S.* may claim it also by the words of the gift. But if land be granted to *J. S.* for ever, no person can stand in his place after his death, or claim any interest, because the party that is next of kin by the law cannot bring himself within the words of the conveyance.

Co. Lit. 9.

It is therefore a general rule, that nothing but the word *heir* will create a fee, for it signifies such a nearest of kin, with all other legal qualifications that are necessarily required in all persons that represent or stand in the place of another, by the *English* law; but this general rule has these following exceptions:

For when the act of disposal relates to

If the father enfeoff the son, to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him; this conveyance passeth a fee to the father.

another thing, that thing becomes in a manner part of the disposition, for in such cases the mind is carried to the notion of an heir as truly and surely as if the word had been in the instrument itself; so that there is a great difference between this case and the case where other words are substituted instead of the word *heir*; for scarce any other word can express all the notions that make up the idea of an heir; but where there is a relation to a legal heir, it is the same thing as if it were expressed in the conveyance itself.

itself, because the word is but to put us in mind of the thing which is done already by the relation; for as we say not only that which is certain that is so in itself; but that, also, which by some other standard is reducible to a certainty; so that not only that conveyance hath force, which hath words in it to answer the intent of the party, but that also which borrows strength from any other thing to answer the same design; and this will appear plain by the following instances:

By a fine *come ceo*, &c. a fee-simple will pass without the word *heirs*, because it hath relation to a precedent feoffment, which is supposed to pass the fee. Co. Lit. 9.

If the lord releases all his right to the tenant, the feignory is extinct without the word *heirs*, for this instrument is to discharge the estate of the tenant, and therefore hath a necessary relation to the estate, which the lord at first created, and consequently, it refers to those words that in the original of the estate gave him a fee-simple. Co. Lit. 9.

If there be two coparceners, and one of them release all her right to the other, without the word *heirs*, this passes a fee; for each coparcener till partition is seised of the whole estate in fee, though each of them hath right or legal demand to the fee of a moiety only: when, therefore, one releases all her right, it hath a necessary relation to the estate whereof the other is seised, and to which she hath a right, which is the fee. Co. Lit. 9.

If there be two jointenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee which they jointly took, and are possessed of by force of the first conveyance. But tenants in common cannot release to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which one cannot transfer to the other, without the solemnity of livery. Co. Lit. 9. 2. O. 2.

A common recovery is in nature of an action commenced, and judgment upon it, and therefore passeth a fee without the word *heirs*; for it hath relation to a precedent right in the recoveror, which must be supposed a right to the fee. Co. Lit. 9.

If one coparcener grants a rent to another for owelty of partition, the grant is good without the word *heirs*, for, coming in recompence of an inheritance, it has a plain relation to the inheritance departed with, as if the word *heirs* had been in the gift. Co. Lit. 9.

A restitution to a person attainted and pardoned will not pass a fee without the word *heirs*, for, since the party forfeited the estate, the restitution is in nature of a *new* grant; and here are no words that create a necessary relation to that fee, which the person formerly attainted had, for he may be restored to his estate during his own life. It is a new grant in nature of a restitution.

Where a man is called to parliament by writ, the inheritance is in him without the word *heirs*, because the writ is in nature of a citation to appear at the court of parliament, and the heir cannot be cited to appear, and therefore there is no mention made of him. Inst. 9. b. [But the blood of the person summoned is not ennobled, till he takes his seat in parliament. Id. 160.]

There are some species of fees that are expressed without the word *heirs*, for the words whereby they are created signify inheritance. Co. Lit. 9. 6.

[(a) A fee will pass to a sole corporation without words of limitation or succession, when the grant is made to the corporation by its corporate or collective name. Thus, a gift *ecclesie de A.* will pass a fee, though the deed of gift contain no words of succession. 11 H. 4. 84. b. 1 Atk. 437. (b) That is, if the king takes them in his royal polittick capacity, *jure corona.*]

ance, as the word *frankmarriage* signifies an inheritance given in consideration of marriage, which, being for the peopling of the country, had several privileges annexed to it: so, *frankalmoigne* signifies an inheritance devoted to God, which was mightily favoured by the superstition of ancient times: so, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, because in judgment of law they never die (a): for the same reason, if lands are given to the king by deed inrolled without the word *successors* or *heirs*, a fee-simple passeth (b).

Co. Lit.
10. a.

There are likewise particular kinds of laws within the kingdom, that allow of the transferring of inheritances without the word *heirs*, as the law of the forest, which dependeth on the mere pleasure of the king, and not on the solemnities and forms of a contract; and therefore, if the king granted an assart at a justice-seat, *habend. & tenend. sibi in perpetuum*, the party had a fee without the word *heirs*, inasmuch as the king had signified his pleasure, that the party should have the privilege of tillage for ever.

Co. Lit. 9.
But for this
vide tit.
Devifes.

In wills and testaments, where the mind of the party appears to transfer a fee, for the mind of dying persons delivered in haste ought to receive a benign interpretation.

2. When it is a Word of Purchase.

Lit. § 578.
2 Roll. Abr.
415. 417.
Co. 104.

The first rule to be observed is this, That where the ancestor takes an estate for life, and a limitation is afterwards made to his right heirs, there, the ancestor has the reversion executed in himself, and the right heirs are not purchasers; as if a lease for life be made to *A.*, remainder to *B.*, remainder to the right heirs of *A.*, such remainder is executed in *A.* and he may grant it over; but if a lease for years be made to *A.*, remainder to the right heirs of *A.*, this is a contingent remainder to the right heirs of *A.*, and *A.* himself takes nothing by such limitation; and the reason of the difference is this; in the first case *A.* having an estate for life is *feoffatus* within the statute *quia emptores, &c.*, and consequently, capable of performing the feudal services; and then to make the right heir a purchaser would be to suspend the services of the feud during the life of *A.* who is capable of performing them; which would apparently tend to the weakening of the tenure and state of the kingdom; and therefore such interpretation ought to be made as best supports the tenure, when the words will bear both senses; for if, after such limitation to the right heirs of tenant for life, he still continued but barely tenant for life, he would not be in the homage of the lord, nor would he be obliged to venture his life in the wars for such estate; and he in remainder would not be obliged to do the feudal services, because, during the

the life of the tenant for life, he has no interest in the land, for his remainder cannot execute during the particular estate, and consequently, he is not obliged to do the services of the feud; and if such remainder was to vest in the right heirs as purchasers, it could not vest during the life of tenant for life, *quia non est hæres viventis*; and then by such construction the services of the feud would be neglected during the life of *A.*, for there would be no one to perform them. But in the last case you cannot vest the remainder in the lessee for years, for he is not *feoffatus* within the statute; for the person that properly takes by the feoffment is the freeholder, and then consequently, although you should construe a limitation to such right heirs a remainder vested in the lessee for years; yet he, having not the immediate freehold in him, would not be obliged to do the feudal services till the intermediate remainder was spent; and therefore the remainder to the right heirs is not immediately vested in the lessee for years, because the heir is the first that can have the freehold as feudal tenant to the lord, and therefore by the words of the donation must be the first purchaser of such remainder. And though in the first case they admit such limitation to be a remainder executed for public convenience, *viz.* that the feudal services, if possible, may be answered; yet it would be ridiculous to admit such construction in the last case, since it would not make a feudal tenant to answer the services; and to run counter to the tenor of a man's grant, without a benefit to any body, would be most absurd, for such construction would not make a feudal tenant, because the lessee for years would not hold of the lord, nor could the lord avow upon him.

But if a feoffment be made to the use of *A.* and *B.* during their joint lives, and after the death of either of them, to the use of *C.* for life, and after to the heir of the body of *B.*, though *B.* hath an estate of freehold, yet the remainder limited to the heirs of his body does not vest, but is in abeyance, because by this limitation the estate of freehold may determine in *B.* during the continuance of his life; and since *B.* is not let into the estate during his whole life, his heir cannot take as representative of him, for such representative must be of an estate of which *B.* was seised; and since by the intention of this conveyance the feoffor hath not limited it in such a manner, that *B.* in all events should die seised of the estate, it is plain he designs only a contingent benefit to the heirs of the body of *B.* as original purchasers, and not by derivation from him.

If a lease for life be made to *A.*, remainder to the right heirs of *B.*, this is a good contingent remainder if livery be made, because such act of notoriety delivers over the freehold to *A.* at the time it is made, and thereby creates a tenant, who is *feoffatus* within the statute to hold of the lord, who is capable of doing the feudal services, except homage, and on whom the lord may avow: and by this construction there is no inconvenience, or suspension of all the feudal services; for if *A.* should die during the life of *B.*, the contingent remainder would become void, because there would be no feudal tenant to attend the services; for the right heir could

2 Roll.
Abr. 418.

Roll. Abr.
418.

not take it during the life of *B.*, and then the land would return to the donor, who would be again tenant to answer the services.

And. 3.
Co. Lit.
20. b.
Dyer, 156.
Roll. Abr.
827.
2 Roll.
Abr. 415.
Leon. 182.
Fenwick v.
Mitford.
Moor, 284.

But if *A.* makes a lease for life, or a gift in tail, remainder to his right heirs; this is a void limitation in its original creation, for it cannot vest immediately any more than in the former case, *quia non est hæres viventis*; and to construe it a contingent remainder would be to suspend the services of the feud to no purpose; for it is not possible that it can vest during the life of the grantor, for so long as he lives he can have no representative or heirs, and therefore not like the former case, which may possibly vest the minute after the grant is made, or at least during the life of the grantor. Besides, that in this case, where the feoffor has not parted with the whole estate out of him, the feoffee does not hold of the lord within the statute *quia emptores, &c.** and to construe this limitation to the right heirs a parting with the whole estate, would be an absurd construction, because the ancestor, in case he outlives the particular estate, must be in of his old reversion, since he cannot have an heir during his life; and the ancestor, cannot be supposed to design the heir should take as a purchaser, since it were an absurd intention, that that estate, which would of course descend to him, should vest in him in the same manner as a purchaser; and by consequence, since there is no alteration by the conveyance from the course in which the estate would have descended, it must be a void limitation.

* See tit.
Remainder
and Reversion.

Estate in Tail.

See this statute expounded, 2 Inst. 333. Fee-tail was originally termed the

BEFORE we enter into a disquisition of estates-tail, as they stand on the statute *de donis conditionalibus*, it will be necessary to take a more particular view of the conditional fee at common law, because the statute *de donis* creates no estates-tail, but of such estates as were anciently conditional fees.

feudum novum, in opposition to fee-simple absolute, or the *feudum antiquum*, and went only to the descendants, either male or female, according to the words and limitation of the feudal donation, and thence came to be distinguished into *feudum masculinum* and *fæmininum*.

Co. Lit.
19. a.

If lands were given to a man and the heirs male of his body, the issue female were not inheritable, because the feudal donation expressing particularly what heirs of the donee were to inherit, no heir, though of the body of such feuditary, could inherit, that did not come under the words and limitation of the donation.

Co. Lit.
19. a.
7 Co. 35. a.

And if the donee had issue two sons, and died, and the eldest died leaving a daughter, the youngest son came into the succession

of the feud, and excluded the daughter; and if there had been no son, the feud (a) reverted to the donor; for the express words of the first donation, which regulated all subsequent descents, excluded all females from inheriting such feud: so, *e contra*, if the feud had been given to a man and the heirs female of his body, the descent was to be conveyed to the females only, exclusive of all males, according to the words of the first donation.

(a) For the collateral heirs were excluded. Roll. Abr. 841.

But if the limitation of the feud had been to a man and his heirs male, such donation did not exclude the females, but let them and (b) all collateral heirs in, because such donation, not limiting the feud to the descendants of any body, could not be good as a *feudum novum*; and if it were construed a *feudum antiquum*, the course of descent cannot be altered by any man's private fancy; and since it appeared by the words of the donation, that the donor intended an estate of inheritance, his words were to be taken most strongly against himself, and should pass the most absolute estate of inheritance, which is a fee-simple to which not only his lineal heirs, but also his collateral heirs, are inheritable.

Co. Lit. 13. a. (b) And therefore this at this day is a fee simple. Jon. 105.

The power of alienation was not absolute in the *feudum novum*, because such power might have been employed to disappoint the lord of his reverter; and yet they did not absolutely take away from such feuditaries the power of alienation, because that would have created a perpetuity, which was against the original policy of the *English* law. To come therefore to a temper between these extremes, the donee was not allowed to alien till issue had, because till then he had not a descendible estate in him, and therefore could not transfer a descendible estate to others; and if he should have been allowed to have aliened whether he had issue or not, such alienations would have disappointed the limitations and restrictions in the gift, which brought it back to the lord on failure of issue; and therefore they construed the words of the feudal donation not only as a limitation but condition, which the feuditary was obliged to perform before he had an absolute power over the estate; for such donations were generally made for the propagation of families, and therefore it best answered the design of such gifts, to suppose the power of alienation to arise on the begetting of issue, because in such cases the feuditary had the contingencies of a family; for when issue was had, they looked upon the lord's possibility to be at a great distance, and they admitted of an absolute power of alienation: therefore, if a man had aliened before issue had, the lord could not have entered for a forfeiture, because that would have been contrary to his own donation, which carried it to the feuditary and his descendants; and therefore, if descendants were afterwards born, the lord was excluded during the continuance of such issue, and the issue born after the alienation could not have entered, because they only claim as representatives to their ancestor, and therefore his actual alienation barred them.

Co. Lit. 19. a. Plow. 246. b. 7 Co. 34. b. Roll. Abr. 840, 841. 2 Init. 333.

But if such tenant had aliened before issue had, and afterwards had issue, and then the tenant and such issue had died, such alienation had not barred the donor of his right of reverter, because the

Plow. 2-5. Co. Lit. 19.

the

the condition was not performed at the time of the alienation, so that the tenant had not an absolute property vested in him for the purpose; wherefore, since the alienation was before the tenant had such power, it was subject to the lord's claim as if no such alienation had been, and, by consequence, the lord might have entered as in his reverter, as if the tenant had died without issue, and the subsequent birth of the issue is not a sufficient performance of the condition to make the precedent alienation valid, since that were to allow of the alienation of a person who had no power to alien.

7 Co. 34,
35. Co.
Lit. 19. 2.

But if a gift was made to a man and the heirs of his body, and the donee had died leaving issue, such issue, without having issue, might have aliened, because, coming in by descent, he had the same power over it as he had over other estates descendible; and succeeding into his ancestor's estate, who had an absolute power of alienation, he took it in the same manner discharged of any restraint from the condition, and the rather, because otherwise the issue could not have made the necessary provisions on his own marriage by a family settlement: but if the issue had not aliened, it had followed the limitation of the first donation, because the estate had continued in the same condition without alteration, and consequently, on failure of issue according to the first donation, the lord had been in, in his feudal right of reverter.

Co. Lit.
19. a.
Roll. Abr.
840.

And as the feuditary had power to alien the land after he had issue, so likewise might he have charged it with a rent, common, &c. for this power necessarily follows an absolute and entire property; for if he might have aliened the feud from his issue, it is but part of that power to transmit it to his issue under any charge or incumbrance he thought fit.

Co. Lit. 19.
a. Roll.
Abr. 840.

So, the feuditary, by having issue, might have forfeited the feud for treason or felony.

Co. Lit. 19.
except where
a man made

If there was no express reservation of services in the first feudal donation, the donee held of the donor as he held over.

a gift in frankmarriage, for in such case the donee held free from all services till the fourth degree was past; because these gifts being made by the feuditary on the marriage of his daughter, or some other relation, such promotion was thought a sufficient consideration for the gift, without an acknowledgment of an annual service, or where the tenant in grand serjeanty made a gift in tail generally, without any special reservation. Co. Lit. 23. a.

6 Co. 40. a.
Sir Anthony
Mildmay's
case.

Co. Lit. 21.
2 Inst. 335.
Mo. 155-6.
Vent. 299.
2 Mod. 131.
Co. Lit. 392.

Thus the law stood till the 13 Ed. 1. c. 1. when the statute *de donis conditionalibus* was made, which deprived the feuditary of his ancient power of alienation, upon his having issue, or performing the condition. The pretence of making this statute, as appears from the preamble, was to comply with the will of the donor, who in all such grants intended that the feud should be transmitted to the descendants of the feuditary in the same plight he received it; and upon failure of the descendants, that it should revert to the donor himself: but the real design of making the statute was to introduce a perpetuity to other purposes; for, towards the end of the baron's war, the crown took up a new method of politics to break the interest of the baronage; for when any feud that was then subsisting in large districts and territories escheated, or was

forfeited

forfeited to the crown, the king divided it, and gave it out in lesser feuds, thereby to destroy the power of the peerage: this the barons saw would tend to the ruin of their body, and therefore passed this act to make all such new feuds unalienable, and by that means not forfeitable for treason, though the condition should be performed by having issue; and from the time of this statute, the donor's possibility or right of reverter was turned into a reversion; and the donee, who before had a fee-simple conditional, has now but an estate-tail.

Under this Head we shall consider,

- (A) What Things may be entailed within the Statute *de donis conditionalibus*.
- (B) What Words are requisite to create an Estate-tail in a Deed or Gift.
- (C) Of the several Sorts of Estates-tail.
- (D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

- (A) What Things may be entailed within the Statute *de donis conditionalibus*.

THE statute makes use of the word *tenementum*, and therefore the estate to be entailed may be as well incorporeal as corporeal inheritances, because the word *tenementum* comprehends the one as well as the other, and, consequently, not only lands may be entailed, but all rents, commons, estovers, or other profits arising from lands. Co. Lit. 19.
b. 20. a.

But it is not necessary that the thing to be entailed should issue out of land; for if it be annexed to lands, or any ways concern or relate to them, it may be entailed within the statute; and therefore offices and dignities may be entailed; and accordingly it has been (a) resolved, that if the king creates a man earl of *D.* to him and the heirs male of his body; this is a good entail of the dignity within the statute, because the title or dignity relates to lands; and anciently they were computed from their possessions, as a baron's fee, an earl's fee, &c. Co. Lit.
20. a.
(a) 7 Co.
33. Nevil's
case.

So offices may be entailed; as the office of earl-marshal of *England*; or the office of a steward, bailiff, or receiver of a manor, because these are demandable in a *precipe, ut tenementa*, and being excisable within the manor, are therefore looked upon as members or branches of it. Co. Lit.
20. a.
1 Roll.
Abr. 838.
7 Co. 33.
Plow. 2.

Hard. 465. An equity of redemption is entailable, because the mortgage being a pledge for money, equity looks upon the estate in the same plight as it was before.

Co. Lit. 20. Charters may be entailed, because they are muniments belonging to the land itself; but if the entail be barred by collateral warranty, then the heir shall not have detinue for them, for then he cannot make title by virtue of the entail.

Co. Lit. 20. a. But things merely personal, which only charge the person, and neither issue out of land nor relate to it, nor can be demanded *ut tenementum* in a *precipe*, cannot be entailed within the statute; and therefore, if I grant to *B.* and the heirs of his body, to be master of my hawks, or keeper of my hounds, with a fee or salary annexed to it, this is no entail within the statute, because this can no way fall within the notion of *tenementum*.

Plow. 3. a. So, if *A.* for him and his heirs grants an annuity to *B.* and the heirs of his body; this, having no manner of relation to land, is no entail within the statute, for such grant only affects the person of the grantor.

Roll. Abr. 837. tit. "Annuity and Rent-charge. Tom. 1. 177. note.]

Co. Lit. 20. a. No chattels real can be entailed, and therefore, though a man, possessed of a term for years, should devise his term to *J. S.* and the heirs of his body, yet the term would go on in its old channel to the executors, and the issue of the body of the donee has no interest in the term, and *J. S.* may sell or dispose of it as he pleases; for this being no *tenementum* within the statute, the devisee is not tied up from alienating it by that act. So it is of a trust, for a man can no more entail a term in gross by way of trust, than by way of devise. But a term for years, which is created or kept on foot to attend the inheritance, is allowed in Chancery to wait upon the entail of the inheritance.

[Two things seem essential to an entail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore, neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *certain* *que vi*, nor terms for years, are entailable any more than personal chattels; because, as the latter not being interests either in things *real* or of *inheritance*, want *both* requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an entail, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. Thus, estates *pur autre vie* may be devised or limited in strict settlement by way of remainder like estates of inheritance; and such as have interests in the nature of estates-tail may bar their issue and all remainders over by alienation of the estate *pur autre vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*; but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur autre vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no remainders can be limited; but they may be entailed by *executory devise* or by deed of trust, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being, and 21 years after, and perhaps in the case of a posthumous child a few months more; a limitation of time not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder, as to postpone a complete bar of the entail by *fine* or *recovery* for a longer space. It is also proper to observe, that in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate-tail, bars the issue and all the subsequent limitations, as effectually as *fine* and *recovery* in the case of estates entailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*; and further, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personality, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of entail; and though the modes vary according

according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. As to the entail of estates *pur autre vie*, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 524. 2 Atk. 259. 376. 3 Atk. 464. 2 Vez. 681. As to the entail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampet's case, 10 Co. 46. b. Child and Bailey, W. Jon. 15. Duke of Norfolk's case, 3 Ch. Ca. 1. a case in Carth. 267. and one in 1 P. Wms. 1. Foley v. Burnell, 1 Br. Ch. Ca. 274. Hargr. note, Co. Litt. 20. a. b.—The doctrine upon this part of the subject is stated in the above note with such neatness, perspicuity, and succinctness, that the editor, feeling it impossible to deliver it in fewer or better words, has taken the liberty of transcribing it at length.]

As to the entail of copyholds, *vide tit. Copyhold*, vol. 1. 709.

(B) What Words are requisite to create an Estate-tail in a Deed or Gift.

WHEN the notion of succession prevailed, it was necessary in feudal donations to use the word *heirs* to distinguish such descendible feud from that which was granted only for life, but as to the word *body*, it was not necessary to make use of that in the donation, but it might be expressed by any equivalent words; and (a) therefore, a gift to a man, and *heredibus de se*, or *de carne*, *quos sibi contigerit habere*, or *procreavit*, is a good estate-tail, for these sufficiently circumscribe the word *heirs* to the descendants of the feuditary.

For that inheritances being only derived from the law, the law requires the word *heirs* that comprehends the whole notion of such legal representation; but the limiting of the inheritance to the descendants of this or the other body, is only the particular intention of the person that forms the gift, and therefore the law leaves every man to express himself in such manner as may manifest that intention.

Therefore, if lands are given to a man & *heredibus, quos sibi contigerit, habere de uxore sua*; this is an estate-tail, though the word *body* be omitted: so, if the gift had been to him & *heredibus suis de prima uxore sua*, for this confines the word *heirs* to the descendants of his body, since his heirs, who can inherit that gift, must be of his wife, which no collateral heir can possibly be.

A feoffment was made to the use of *A.* for life, remainder to the use of *B.*, and of the heirs male of the said *B.* lawfully begotten, and for default of such issue, remainder over, *A.* dies; this is no estate-tail in *B.*, but a fee-simple, because there are no words to shew from whose body the heirs male of *B.* must proceed; for, to the creation of an estate-tail, it is requisite that there be words sufficient to shew from what body the heirs mentioned in the gift are to proceed, though the word *body* be not expressly used; for in this case such may be heirs male of *B.* as were never proceeding from his body, since the words of the donation leave it at large, and do not require that they should be begotten by any particular person. otherwise in a will, which being made without the assistance of a lawyer, receives always a favourable interpretation; *vide tit. Devise*.

So, where *A.* seized in fee of a copyhold, surrendered the same to the use of himself for life, and after to *B.* and *C.* his wife, *pro*

For the words which create an entail in a will, *vide tit. Devise*. (a) Co. Litt. 20. 7 Co. 41. b. and the reason of the difference is,

7 Co. 41, 42.

Cro. Eliz. 478. Mo. 424. 7 Co. 41. S. C. between Abraham and Twigg. Lit. Rep. 344. Plow. 541. 3 Leon. 5. Hob. 32. 37. 2 Sid. 41.; but it would be a favourable

2 Salk. 610. pi. 3. Idle v. Cooke

2 Ld. Raym. *pro & durante termino vitarum suarum naturalium & hered. & assignat. prædict.* B. & C. & *pro defectu talis exitus*, to the use of himself and his heirs; it was held by Holt, C. J. and two judges, against Gould, that B. and C. had a fee-simple, and that *pro defectu talis exitus* imported nothing of their dying without issue, but was to be taken generally, and every heir is the issue of some body.

in this case, because of the word *assigns*, for an estate-tail is not assignable; but Gould *cont.* because the intent of the party was to create an estate-tail.

Carth. 343. But if *A.* seised in fee makes a voluntary feoffment to the use of himself for life, remainder to the use of *J. S.* and his heirs for ever; and for default of issue of the body of *J. S.* then to the use of the right heirs of *A.*, this being in a conveyance by way of *use*, which is always construed like a will, and according to the intention of the party, gives *J. S.* but an estate-tail.

5 Ann. 266. 1 Ld. Raym. 101. 3 Salk. 337. *S. C.* adjudged between Leigh and Brace. Hil. 6 W. 3. in *B. R.* and same point said to have been adjudged upon this very deed in *C. B.* between Coke and Roberts. Hil. 2 W. 3.

7 Co. 41. If land be given to *A.* and *B.* his wife, and their heirs, & *aliis hæredibus* of the said *A.* *si dicti hæredes de A. & B. exeuntes obierint sine hæredibus de se*, this is a good estate-tail, though the word *body* be omitted, because there are words equivalent, which equally circumscribe the general import of the word *heirs* to the descendants of the body of *A.* and *B.*

Roll. Abr. 538. Co. Lit. 20. b. [A settlement was made on *A.* for life, remainder on *B.* and the heirs-male of his body, with power of revocation to *A.* of *B.*'s remainder.—*A.* reciting the settlement to be on *B.* and his heirs male, omitting the words of *his body*, revoked the old uses, and by the new deed limited the said estate in the said deed named to *B.* and his heir-male, omitting the words of *his body*, and subjected the estate thus limited to a charge of 100*l.* It was holden, that this was a good revocation, and a good limitation of a new estate-tail; for that the recital, though inaccurate, referred to the limitation in the settlement to the heirs of the body; the revocation was of those uses which the recital had referred to and professed to itate; and the new limitation was of the estate described in the settlement, subject only to the charge of 100*l.* *Gilmore v. Harris*, 3 Lev. 213. Carth. 292. *S. C.* Skin. 325. *S. C.*]

Co. Lit. 20. b. But if a gift be made to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *J. S.* in *formâ prædictâ*, this, according to my Lord Coke, is a void limitation to *J. S.*; for, though the mind is carried to the former limitations, yet finding no necessary relation to one more than the other, it can determine nothing

thing positively as to the intention of the donor, and therefore such limitation is void for uncertainty*.

* Note :
Co. Lit.
385. b. says,
" If a man letteth lands for life, the remainder *eodem formâ*, this is a good estate-tail, *quia idem semper refertur proximo præcedenti.*" And this seems to be law, for the reason assigned.

If lands be given to a man and his heirs, *habendum* to him and the heirs of his body; this is but an estate-tail, because the *habendum* expounds the general word *heirs* in the premises; for though it cannot change or alter them, so as to retract the gift in the premises, yet it may well construe and explain them while such construction is consistent with the premises, and does not destroy the operation of the words mentioned in them, but only explains in what sense they are to be taken, and what heirs are comprehended. But if the limitation in the premises had been to a man and the heirs of his body, *habendum* to him and his heirs, it had been a tail with a fee-simple expectant, because this *habendum* cannot be construed an exposition, for that it comprehends all heirs in general, and doth not confine or interpret the premises, and therefore, being more comprehensive than the premises, passes the fee-simple expectant.

If lands be given to a man and his heirs, *habendum* to him and his heirs, if the donee has heirs of his body; and if he dies without heirs of his body, that the land shall revert to the donor, or *habendum* to him and his heirs, if he hath issue of his body begotten; and if he dies without heirs of his body, that the lands shall revert to the donor; this is but an estate-tail in the donee, because the *habendum* plainly explains in what sense the word *heirs*, which are used generally in the premises, are to be taken, nor does such explanation retract the gift in the premises, because the word *heirs* have still their operation, and by such construction are more conformable to the will and intention of the donor: but if the *habendum* had been for life, that had been a void limitation, because no explication can reconcile the *habendum* to the premises; and where the last words of the donation retract the former gift, they are taken as insignificant and void, because no man is allowed to vacate his own grant.

If a feoffment be made to A. and his heirs, with warranty to him and his heirs, and if it happens that he dies without heirs of his body, that it shall remain to J. S. in fee; this limitation of a remainder explains what heirs of the donee should take; for it is plain that the donor intended the word *heirs* in the premises should not be taken in their most extended sense, for then they would convey an absolute estate, which would bear no limitation of a remainder over to J. S., and then that part of the gift would be void, which, by an easy explication of what heirs the donor meant in the premises, is made good and consistent, without any force or violence to the premises.

If lands are given to a man and a woman and their heirs, *habendum* to them and the heirs of their bodies, remainder to them and the survivor of them for life, to hold of the *chief lord*; this has been adjudged an estate-tail with a fee-simple expectant; for

Co. Lit.
21. a.
8 Co. 51. b.
2 Roll. Abr.
66. 68.

Roll. Abr.
838.
Co. Lit.
21. a.
Pro. tit.
Tail, 20.

Roll. Abr.
839.
2 Roll.
Abr. 68.

Cro. Car.
476.
2 R. II.
Ab. 68.
Thurmond
and Cooper.

[2 Roll. Rep. 19. 23. In this case there was also a warranty to the grantee and his heirs.

However, the court intimated, that their opinion

would have been the same, if these special circumstances had not occurred.]

Hob. 172.

though the *habendum* explains what heirs are meant in the premises, and there is no mention of the word *heirs* in the remainder; yet it is plainly the intention of the donor, that the interest in the land shall not cease upon the determination of the estate-tail, because there is a remainder limited over to take effect when the tail is spent; and if the limitation of the remainder passes any thing, it must be a fee, because they had a greater estate already in them than for life; and this the rather, because the *tenend.* is expressly to be of the *chief lord*, which shews they intended to leave no estate in themselves.

If I give land to a man and his heirs, *viz.* the heirs of his body; this is but an estate-tail; for here I explain the general import of the word *heirs* to the descendants of the body of the donee.

Cro. Jac.

400.

Cooper and Franklin.

2 Co. 78.

Plow. 555.

Bro. tit.

Feoffment

to Uses, 40.

Co. Lit.

19 b.

A feoffment was made to *A.*, *habendum* to him and the heirs of his body, to the use of him and his heirs and assigns for ever; this is only an estate-tail in *A.* and no fee-simple, for the lands are so appropriated by the first words to the donee and his issue, that no act or limitation of the parties can take it out of them; nor does the statute 27 *H. 8. c. 10.* execute the possession to the use; for the statute never intended to execute any use but that which the legal tenant had been obliged to execute before the statute; but the act *de donis*, as it tied down the donee from alienating, so it would nor permit the Chancery to oblige the donee to give the land away from his issue: the same law, if the use had been limited over to a stranger, for the same reason.

Cro. Car.

231.

Jenkins v.

Young, 245.

Meredith

v. Jones.

Lands were given to baron and feme, *habendum* to baron and feme to the use of them and the heirs of their bodies; this was adjudged an estate-tail; for though such limitation of a use to a stranger had not been a good estate-tail, because the legal estate in baron and feme had only been for their lives, yet here being no feoffee distinct from the *cestui que use*, but they being all the same person, by consequence, there is no use distinct from the legal estate, and therefore, the word *use* may be very properly rejected, in order to establish the intention of the conveyance, and then the case amounts to no more than if an estate were limited to baron and feme for their lives, with remainder to them and the heirs of their bodies.

Hobble-

waite v.

Cartwright,

Ca. temp.

Talb. 30.

Long v.

Beumont,

1 P. Wms.

231. Hewitt

v. Heand,

id. 427.

[Lands were given to one for life, remainder to the heirs male of his body hereafter to be begotten. This was adjudged to be an estate-tail, and that the words *hereafter to be begotten* do not confine it to the issue born after, but will take in that born before, the words *procreatis et procreandis* being of the same import, according to 1 *Infl.* 20. and 24 *E. 3. pl.* 15. And this is to prevent the great confusion that would otherwise be in descents by letting in the younger before the elder.]

Gore v. Gore, 2 P. Wms. 53. S. P. But it hath been holden, that where the words were *in posterum procreandis*, sons born before shall be excluded, on account of the peculiar force of *in posterum*. Adj. M. 26 Eliz. B. R. 3 Leon. 87. Hargr. Co. Lit. 20. b. n. 3.

(C) Of the several Sorts of Estate-tail.

IF lands are given to a man and the heirs of *his body*, this is a *tail general*; because all his descendants may possibly come into the succession; so that if the donee has several wives, the descendants of every wife may inherit, because they fall within the words of the donation: but the donor might by particular expressions have confined the succession to any particular descendant, as to the heirs male or heirs female; and hence the distinction between estates in *tail male* and *tail female*. Lit. § 14.

If lands are given to a man and the heirs male and female of *his body*, this is a *tail general*; because by such limitation all the descendants of the feuditary may inherit. Co. Lit. 25. b. but great care must be

taken to limit the estate to the descendants of *the body* of the donee, for if lands be given to a man and his heirs male, this is a fee-simple. Co. Lit. 13. So, if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female. Lit. § 31.

If land be limited to the son and his heirs, of the body of his father, this is a fee-simple in the son, and no entail at all, not being limited to the son's descendants; nor is there in this case any proper limitation or restriction of the word *heirs*, because it limits it to his heirs of the body of the father. Now there is plainly a design to place the interest that is to vest in the son; and yet it should not go merely to the son's descendants, but to all collaterals, as far as they could claim under the body of the father: but such a limitation the law will not endure, it not being an estate-tail confined to the descendants only; and therefore it must be a fee-simple; for to allow men to form such new sorts of estates would be very inconvenient, as it would put it in the power of private persons to make new limitations touching the course of descents, and thereby render all descents uncertain. Co. Lit. 27.

But if the estate were limited to the son, and to the heirs of the body of the father, though the father was dead at the time of the gift; yet it is a good entail, because here the word *heirs* is a word of purchase; and it is a good name of purchase after the father's decease; and the son, being only tenant for life by the words of the gift, by the second words takes the entail as a purchaser; but in the other case, the words *his heirs* are merely words of limitation, and therefore affect an entail, which the law will not endure. Lit. § 30.

his heirs of the body of the father, this is a good entail; for it goes to the descendants only, and it limits what sort of descendants it shall go to, viz. such only as were begotten by the father. Co. Lit. 20. b. Bro. Tail, 10. If there had been grandfather, father, and son, and the father dies, and the limitation had been to the grandfather and to

If lands be given to husband and wife, and the heirs of the body of the survivor; this is a good donation to vest an estate-tail general in the survivor; but the estate-tail does not vest till one of them dies; and then, because all the descendants of the survivor may inherit the gift, it is a tail general. Co. Lit. 26. a. 10 Co. 51. Reg. 239. b.

Tail special is where the estate is limited to some particular heirs of the body of the donee, as to the heirs of such a woman; as Lit. § 16.

if lands be given to a man and his wife, and the heirs of their two bodies begotten; for though all the descendants of that marriage may inherit the gift, yet all the heirs of the body of the donee cannot inherit; for if the woman should die, and the man take another wife, the issue of the donee by the second wife should not inherit, because the limitation of the gift was only to the descendants of the feuditary by the first marriage.

Co. Lit. 25. b. Fro. Estate, 22. Tail, 16. If land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail special, for the possibility that they may marry, and then the descendants of that marriage can only inherit. So, if the gift be made to a man that hath a wife, and to a woman that hath a husband, and the heirs of their bodies; this is a tail special presently in them, for the possibility that they may marry; and the descendants of such marriage may inherit according to the limitation of the gift.

Plow. 35. a. Co. Lit. 25. b. But if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances, but no joint estate in tail; because, though the husband and the wife of the other may die, and the survivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies, and therefore it can be no joint estate-tail in them all; but they all four take jointly for life, and each husband and his wife have a several inheritance in a moiety.

Lit. § 283. If lands be given to two men, and the heirs of their bodies begotten, they have but a joint estate for life, and several inheritances; for though the gift be limited to the descendants of their bodies; yet, it being impossible there should be one descendant of both their bodies, they cannot have a joint estate-tail.

Lit. § 283. Co. Lit. 25. So, if lands be given to one man and two women, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances; because there can be no one issue of both the women's bodies; and if the man should marry one of them, yet it is not limited in the donation, which of them, in case of such intermarriage, should first take.

3 H. 6. 48. 7 H. 7. 16. If an estate be limited to husband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life; because they shall not be presumed to intermarry after they are once legally divorced by church censures.

Co. Lit. 4. b. 1 c. b. 31. But there are other sorts of estates-tail; as when the donation is limited not only to the descendants of the donee by one woman, but more particularly to one sort of descendants of such marriage, exclusive of others; as if lands be given to a man and a woman, and the heirs male of their bodies; this is an estate in tail-male, for the donor having expressed what heirs shall inherit, none can claim under such gift that does not come under such particular description. So, if the limitation had been to the heirs female; for the donee being capable of taking by purchase, the donor may limit the succession of the land to which of the descendants

scendants of the donee he pleases. But if the limitation had been to *A.* for life, remainder to the heirs female of the body of *J. S.* and *J. S.* has issue a son and a daughter, the daughter can take nothing by such gift; the reason of the difference is this; because in the first case the donation specifies what sort of descendant of the donee shall take; but in the last case it specifies who shall take originally; and the first purchaser must come fully up to the description in the donation, else there can be no gift, and while there is a son of *J. S.* no female can be heir, and consequently not a person capable of taking originally by the gift; but if *J. S.* hath issue a son and a daughter, and the son hath issue a daughter, and dies, and a lease for life is made, remainder to the heirs female of the body of *J. S.* the daughter of the son shall be the purchaser, because she comes within the description, being both heir, and likewise a female, though she was descended from a male.

If lands be given to a man and his wife and the heirs male of the body of the husband; this is a special tail in the husband, and but an estate for life in the wife. So, if the limitation had been to the heirs male of the body of the wife by the husband begotten, it is an estate for life in the husband, and a tail in the wife; for to which ever body the word *heirs* inclines by the limitation, it creates a descendible estate in such person. But if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in both of them; as if lands be given to husband and wife, and the heirs which the husband shall beget on the body of his wife, both of them have an estate-tail, because the word *heirs*, which creates the descendible estate, is not limited to one more than the other.

If a feoffment be made to the use of *A.* and *B.* husband and wife, and the longest liver of them, and after the decease of the said *A.* and *B.* then to the use of the heirs of the body of the said *A.* begotten on the body of *B.*, this is an estate-tail in the husband, for the word *heirs* is limited to the body of *A.* though to be begotten on the body of the wife.

So, if lands be given to baron and feme, and the heirs of the body of the feme, by the husband and *J. S.* engendered; this is an estate-tail in the feme, but so far enlarged by the last words, that the heirs of her body begotten by *J. S.* may inherit after the issue by the present husband.

husband begotten, whether this had been an estate-tail in them both, is left a 2.

[Where an estate for life was limited to *S.* wife of *L.*, remainder to the heirs to be begotten on the body of *S.* by *L.* her husband, no estate being previously limited to the husband himself; it was holden, that the word *heirs* related to both their bodies, and consequently, did not create an estate-tail in *S.*

Sir *R. F.* on the marriage of his son levied a fine, and declared the uses to himself during the joint lives of himself and his son *L. F.*, and after the decease of either of them, to the use of *S. C.*

Lit. § 26,
27, 28.
Yelv. 13.
Repps v.
Bonham.

Hob. 84.
Skeet v.
Oxenbridge.

Yelv. 131.
If the li-
mitation had
been to the
heirs *supra*
corpus of the
feme by the
husband, it is left a 2.

Gossage v.
Taylor,
Sty. 325.

Frogmorton
v. Wharley,
2 Term
Rep. 435.

2 Bl. Rep.
728. S. C.
3 Will. 125.
144. S. C.

for her life, and after her decease to the use of the issue male of the said S. and L. and the heirs of their bodies, and in default of such issue, to the use of the heirs to be begotten on the body of S. by the said L., remainder to the right heirs of the said Sir R. F. The marriage took effect, and S. died leaving six daughters, but no son. Sir R. died leaving L. his son and heir. A question arose on the estate which L. took; and the court resolved, that, if he had been joint-tenant with the wife for life, this had been an estate-tail in both; as the word *heirs* is not applied to any body particularly, as *Litt.* § 28. Secondly, that neither the husband nor wife had an estate-tail: not the husband, because he had no prior estate for life: not the wife, because though she took an estate for life, yet the heirs are not applied to her body.

Denn v.
Gillott,
2 Term
Rep. 431.

On a marriage the husband covenanted to stand seised of lands to the use of himself and his intended wife for their lives, and the life of the longer liver, remainder to the use of the heirs of the husband on the body of his said intended wife by him lawfully to be begotten, remainder to the use of his own right heirs. The husband having survived the wife, levied a fine of the lands, and after his decease, a question arose on the operation of this fine; which depended on the point, whether the words "to the use of the heirs on the body of the wife by the husband to be begotten" gave an estate-tail to the wife only, or a joint estate-tail to both? It was decided, that the limitation gave an estate-tail to both, as well upon the authority of the above case in *Styles*, as of the case cited by Lord Coke, from 3 E. 3. c. 32., where, upon a gift to I. and M. *uxori ejus et heredibus quos idem I. de corpore ipsius M. procrearet, &c.* it was adjudged an estate-tail in both, because the estate was equally entailed to the heirs of the baron, as to the heirs of the wife.

Co. Lit. 26.

Rose v.
Ailthrop,
2 Bl. Rep.
1228.

A freehold estate was settled on husband and wife for life, and on the survivor, remainder to the use of the heirs of the husband on the body of the wife to be begotten, remainder to the right heirs of the husband. A copyhold estate in borough-english was likewise settled to the use of husband and wife and the heirs of their two bodies to be begotten in like manner and to the same uses as the freehold was settled and conveyed. *De Grey, C. J.* This is an estate executed, and seems to be an estate-tail in the husband and wife. *Blackstone, J.* I think the freehold is clearly vested in the husband only in special tail; the copyhold in both husband and wife.]

Lit. § 24.

And it is to be observed, that in all instances of such special tails, which limit the lands to one particular sort of heirs, no descendant of the donee can make himself inheritable to such gift, unless he can convey his descent through that particular sort of heir to which the succession of the land was first limited; therefore if lands be given to a man and the heirs male of his body, and he has issue a daughter, who has issue a son, this son shall never inherit that gift; for the son, being obliged to claim through the daughter, must necessarily shew himself out of the words of the first donation, which limited the lands only to the heirs

heirs male of the donee, which the daughter cannot possibly be taken to be.

For the same reason, if the lands be given to a man and the heirs male of his body begotten, the remainder to him and the heirs female of his body, and the donee hath issue a son, who hath issue a daughter, who hath issue a son; this son can inherit neither of these gifts: not the tail male, because whoever claims as heir to such a gift, must convey his descent wholly through males, which the son cannot do in this case, because he must necessarily shew himself a descendant of the daughter, before he can make himself heir to the first son; nor can he inherit the tail female, because that limitation being to that particular sort of heir, no male, though the immediate descendant of a female, can inherit, because he is another sort of heir than is described in the donation: but if, in this case, the gift had been to a man and the heirs male of his body, remainder to him and the heirs of his body; such son may claim under that gift, because every descendant of such donee may claim under the remainder, it not being limited to one sort of heir more than another.

[Lands were settled to the use of husband and wife for their lives, remainder to the use "*of the heirs of the husband on the body of the wife lawfully begotten or to be begotten, the male to be preferred before the female, and the elder before the younger.*" The lessor of the plaintiff claimed as heir male under this settlement, that is, as son of the second son of the marriage: the defendant claimed as heir at law, that is, as the son of a daughter of the eldest son of the marriage. It was argued on behalf of the defendant, that there was nothing to hinder the descent to the heir at law, though claiming through a female; that the limitation was to *all* the heirs; and that the words of regulation were referable merely to the immediate children of the marriage, to shew how they should take. But the court said, that if these words had any meaning, they described an estate-tail; and it was not to be supposed, that they were inserted without any meaning at all.

If lands be given to a man to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the estate to the heirs female is in remainder, and the daughters shall not inherit any part so long as there is issue male; for the estate to the heirs male is first limited, and shall be first served; and it is as much as to say, and after to the heirs females, and males in construction of law are to be preferred.]

Land given to a man and his wife *et heredi de corpore et uni heredi tantum*, was adjudged an estate-tail, though the limitation be to the heir in the singular number, because the word *heir* is *nomen collectivum*, and extends to all that descend from him.

Co. Lit.
25. b.

Denn v.
Hebbon,
5 Burr.
2609.
2 Bl. Rep.
695. S. C.
See Preston
on Estates,
ch. Estates
Tail.

Co. Lit.
377. a.

Vent. 228.

(D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

THE statute *de donis* affecting a perpetuity restrained the donee in tail, either from alienating or charging his estate-tail; and by that act the tenant in tail was likewise to leave the land to his heirs as he received it from the donor; and the heir in tail might have avoided any alienation or incumbrance of his ancestor; and as the law stood upon the act, so might he in reversion, when the heirs of the donee failed, who were inheritable to the gift. The crown long struggled to break through the perpetuity which was established by this law; and in the reign of E. 4. we find the pretended recompence given against the vouchee in the common recovery to be allowed an equivalent for the estate-tail; and because this recompence was to go in succession as the land in tail should have done, therefore they allowed the recovery to bar the reversion as well as the issue in tail, because he in the reversion was to have the recompence upon failure of issue of the donee.

6 Co. 40.
10 Co. 35.
Vent. 299.

2 Inst. 336.
Plow. 57. b.
But how
these reco-
veries or
fines affect
the issue in tail, or him in reversion or remainder, *vide* tit. Recoveries, and tit. Fines.

The statute *de donis*, by an express clause, provides against the operation of a fine, and by that law a fine levied by tenant in tail amounted to no more than a discontinuance, like a feoffment *in pais* by tenant in tail at this day.

Lit. § 613.
But how far
the tenant
in tail may
at this time
bind his
issue, by
making
leases pur-
suant to the
32 H. 8. c. 28.

At the common law the tenant in tail could not grant or alien, or make any rightful estate of freehold to another, but for term of his own life; for though a feoffment in fee, or for life, made by tenant in tail, are good against the tenant himself, because the law allows no man to avoid his own act; yet after his death the issue in tail, or those in reversion after failure of issue, may by proper actions avoid such feoffments, and recover against the feoffee.

vide tit. Leases and Terms for Years.

Bro. Con-
tract, 26.
11 Co. 50.
Poph. 194.

The tenant in tail is master of the inheritance, and as such has power over all the lasting improvements growing on it; so that he may cut down the timber-trees, and dispose of them as he pleases, without barring the entail. But this must be understood with this restriction, that, if tenant in tail sells the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he dies before they are cut down, his heirs in tail shall have them as part of the inheritance, and the vendee, though obliged to pay the whole sum contracted for, yet shall not be allowed to cut down one tree after the death of tenant in tail; for as the tenant in tail has power over the inheritance but during his own life, so he can delegate that power to another but for the same time; and consequently, whatever remains part of the inheritance at the death of the tenant in tail, at which time his power

power over it ceases, must necessarily go to the heir to whom the inheritance belongs.

So, if tenant in tail grant estovers to another, or the vesture of his woods, these grants determine with his death; for as they are charges on the inheritance, so they must necessarily cease when his power who granted them is determined. Roll. Abr. 841, 842.

If tenant in tail acknowledge a statute or recognizance, upon which the land is extended, the issue may oust the conusee after the death of his ancestor; for the tenant in tail can charge the entail but during his life, because the statute *de donis* preserves it free from all incumbrances for the issue in tail *ut voluntas donatoris observetur*. Roll. Abr. 842.

But if tenant in tail acknowledge a recognizance, and die, and the conusee bring a *scire facias* against the heir in tail, who pleads *riens per descens* in fee-simple, and pending the *scire facias* make a lease for years to *J. S.*, and the jury find the issue in tail had land in fee-simple by descent, the conusee shall extend the land against the issue in tail, and *J. S.* cannot falsify; for after the verdict the issue shall not be allowed to say, that he is tenant in tail; but the verdict, though a perverse one, shall bind him, and be in force till disproved by attain; nor can the lessee falsify, because the lease was made after verdict given, when the issue himself was bound, and, consequently, all that claim under him must be so too. 2 Bull. 235. Crawley and Marrow.

Yet if a disseisor make a gift in tail to *A.*, and *A.* in consideration of a release from the disseisee of all his right to the land, grant him a rent-charge in fee; this shall bind the issue, for this turns upon the reverse of the former cases; for as the issue in tail may avoid those grants and charges, because they tend to the prejudice of the issue and destruction of the entail; so this grant to the disseisee is good to bind the issue, because it tends to the advantage of the donee and his issue by strengthening their title, and making that an indefeasible which before was a precarious estate. Co. Lit. 343. b. Roll. Abr. 842. Plow. 436. 10 Co. 37.

So, where a devise was made of land in tail, upon condition that the donee should grant a rent-charge out of the land to another and his heirs, the donee granted the rent pursuant to the condition; and adjudged the rent should not determine with the death of the donee, but should bind his issue, for this is in preservation of the entail, and for the benefit of the issue, and is not *contra formam doni*, but in compliance with the will of the donor. Cro. Jac. 427. Dutton v. Ingram. Roll. Abr. 842.

A. seized of lands in tail, agrees with *B.* that he and his heirs shall enjoy the entailed lands, if *A.* and his heirs may enjoy his fee-simple lands; this agreement is executed accordingly; and *B.* has a decree against *A.* to levy a fine, and settle it pursuant to the agreement; but *A.* dies without doing of it: though it was decreed that *A.* himself was bound by his agreement to convey, yet since he died before he executed the fine, his issue was not bound by the agreement; but if the issue in tail had approved of his ancestor's agreement, as he did in this case, by entering on the land of *B.*, then it becomes his own agreement, and, consequently, in equity he shall be obliged to perform it. Chan. Cases, 171. Rolfe v. Rolfe. Vide tit. "Agreements," tom. i. 105.

Estate-tail after Possibility of Issue extinct.

- (A) Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.
- (B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.
-

- (A) Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.

Blackstone
feigns, Sir
William
Blackstone
saith, the
law makes
use of as
absolutely
necessary to
give an ade-
quate idea of
such per-
son's estate.
For had it

SUCH person is tenant in tail *apres* possibility of issue extinct (*a*), as survives the person by whom, or on whom, the issue was to be begotten; as where lands are given to a man and his wife in special tail, if the husband dies without issue, the wife is tenant in tail after possibility, &c. because the husband, by whom the issue inheritable to such special tail was to be begotten, is dead, so that, there being no issue living at his death, there is now no possibility of any by him: so *e converso*, if the wife dies without issue the husband is tenant in tail after possibility, because she being the person on whom the issue inheritable to the estate-tail was to be begotten, when she dies without issue, there is no possibility of the husband's having any issue by her inheritable to the tail.

called him barely *tenant in fee-tail special*, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs, capable of taking *per se* *firmam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone." 2 Comm. 124.]

Lit. § 33.

If the lands be given to a man and his heirs which he shall beget on the body of his wife; in this case, though the wife takes nothing by the gift, yet if she dies without issue of her body be-
gotten

gotten by her husband, he is tenant in tail after possibility, because the wife, on whose body the issue was to be begotten, being now dead without issue, he can have none by her.

If baron and feme be tenants in special tail, and one of them dies, leaving issue, though the survivor cannot be tenant in tail *apres* possibility during the life of such issue; yet if that issue dies without issue, so as that there is not any issue living which can inherit by force of such entail, then the survivor becomes tenant in tail after possibility, &c. for since the issue inheritable to such entail was to proceed from both the bodies of the donees, upon the death of either of them without issue, it is plainly impossible the survivor should have any issue inheritable to the entail. Lit. § 32.

But if baron and feme, tenants in special tail, live till each of them be 100 years old without issue, yet they still continue tenants in special tail; for however improbable it may seem that they should have issue at that age, yet the law sees no impossibility of having issue, and there must be no possibility of having issue, before the donees or either of them can be tenants in tail *apres* possibility: besides, there is not any particular and certain period of time in which the possibility of issue ceases, and therefore the law cannot make either of them tenant in tail after possibility, till after the death of one of them. Co. Lit. 28. a.

If lands be given to baron and feme and the heirs of their two bodies, and they are divorced *causâ præcontractus* or *affinitatis*, here there is no possibility of their having issue which can inherit by force of the gift, and yet they are not tenants in tail after possibility, &c. but the inheritance is turned into a bare joint estate for life; for the impossibility of having issue must proceed from the act of God, to make them tenants in tail after possibility, &c. but in this case it proceeded from the act of the parties. 11 Co. 80. b. Co. Lit. 28. a.

So, if lands be given to a man in tail upon condition, that if he does such an act, that he shall have the land but for life; such donee, upon breach of the condition, is but barely tenant for life, and not tenant in tail *apres* possibility, &c. because here by his own act it becomes impossible to have issue inheritable to the tail, which by his own act he has destroyed and forfeited. 11 Co. 80. b.

A feoffment was made to the use of a man and his wife for their lives, remainder to the use of their next issue male to be begotten in tail, remainder to the use of the husband and wife and the heirs of their two bodies begotten, they having no issue male at the time of the feoffment; in this case the husband and wife are tenants in tail executed; and upon the birth of any issue male, their estate opens, and they become tenants for life, remainder to the issue male in tail, remainder to themselves in tail; and if the husband dies without having any other issue, the wife continues but tenant for life, because the estate-tail, which was once executed in her and in her husband, was changed into an estate for life by their own act; yet she shall have the privileges of tenant in tail *apres* possibility, &c. for the inheritance which was once in her; for this is not like the former case, where the breach of the condition respects what was granted; for in this case the birth of issue 11 Co. 80, 81. Co. Lit. 28. a. Lewis Bowles's case.

issue male shall not be presumed to divest the privileges of tenant in tail, which were once legally vested in her.

Co. Lit.
28. a.

Lands were given to a man and his wife and the heirs of the body of the husband, remainder to the husband and wife and the heirs of their two bodies begotten; upon the death of the husband without issue, the feme shall not be tenant in tail *apres* possibility, &c. for by the first limitation she took only an estate for life, and the husband an estate in tail general, and the remainder over was a void limitation, because it could never take effect; for whatever issue the husband and wife had must inherit by force of the first limitation of the tail general, because all such issue are of the body of the husband; and when the tail general is spent in him, there cannot possibly be any issue to inherit the remainder in tail special, because such issue must be of the body of the husband and wife; and while there is any issue in being of the body of the husband, it inherits by force of the general tail; so that the remainder being void in its original creation, the wife had never an estate of inheritance in her, and, consequently, cannot be tenant in tail *apres* possibility, &c. because such an estate can be carved only out of an estate-tail.

(B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.

Co. Lit. 28.
11 Co. 80. b.
Doct. &
Stud. 60.

IF tenant in tail *apres* possibility, &c. alien in fee, it is a forfeiture of his estate, because, having no longer a descendible estate in him, he cannot transfer it to another, without the prejudice and disinheritance of him in remainder.

Co. Lit.
28. a.
11 Co. 80. b.
Doct. &
Stud. 60.

If tenant in tail *apres* possibility be empleaded, and make default, he in reversion shall be received, as upon the default of any other tenant for life, because he having the inheritance in him only shall be admitted to defend it.

Co. Lit.
28. a.
11 Co. 80. b.

An exchange by tenant in tail *apres* possibility, &c. with a bare tenant for life, is good, because both their estates are of equal continuance and duration only: so for the same reason, if any estate of inheritance in reversion or remainder descends upon him, the estate-tail *apres* possibility, &c. is merged, because as to its duration, it is merely an estate for life, and in these respects we may call him but tenant for life; yet in other respects he has the privilege of one who has an estate of inheritance.

Doct. &
Stud. 61.
Co. Lit.
27. b.
11 Co. 80. a.
[But a court
of equity will
restrain him
at least from
committing
wastefulness]

For he is punishable of waste, so that he has power over the lasting improvements of the land; for since he formerly had the inheritance in him, which the act of God has stripped him of, without any default of his, the privileges and benefits of the inheritance still continue in him. Besides, to punish this tenant for waste, seems to be against the design and intention of the first donation; for by that the donor gave the inheritance and an absolute power over the lasting improvements, which are looked upon

as part of the inheritance for their duration, and, consequently, it can be no injury to him in reversion, nor beside his intention in the donation, if the donee exercises the power he was intrusted with by the donor; nor can the donor revoke it, because the authority given by the gift must continue as long as the gift to which it was annexed continues.

Waste (A), pl. 1. S. C. 2 Show. 69. S. C. Anon. 2 Freem. 273. S. P.

He shall not have aid of him in reversion, because he having originally the inheritance by the first gift, has likewise the custody of the writings which are necessary to defend it.

For the same reason he may join the wife in a writ of right, because, the deeds belonging to the inheritance lying in his hands, he may make out his title without calling in the reversioner.

The writ of entry *in causa consimili* doth not lie upon his alienation, as it does for him in the reversion, upon the alienation of any other tenant for life, because this case is not *consimilis* to that of tenant in dower, because this tenant had originally the inheritance in him, which the tenant in dower never had.

If upon the death of tenant in tail after possibility, &c. a stranger intrudes, yet no writ of intrusion lies against such intruder, because this writ is given only upon an entry and intrusion after the death of a bare tenant for life, which this tenant is not.

He shall not be called tenant for life in a *præcipe* brought by or against him, because his original infeudation, by which he claims, was of an estate of inheritance, not of an estate for life.

and extravagant waste. Abraham v. Bubb, 2 Freem. Rep. 53. 2 Eq. Ca. Abr. tit.

Co. Lit. 27. b. 11 Co. 80. b.

Co. Lit. 27. b. 11 Co. 8.

Co. Lit. 27. b. 11 Co. 80. b. F. N. B. 206. Booth, 199.

Co. Lit. 27. b. 11 Co. 80. b. Booth, 131.

Co. Lit. 27. b. 11 Co. 80. b.

Estate for Life and Occupancy.

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

(B) Who upon the Death of Tenant for Life is to enjoy the Land; and herein of Occupancy: And,

1. Of what Things a Man may make himself a Title to by Occupation.

2. What

2. What makes an Occupant.
3. The Way to prevent the General Occupant ; and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 Car. 2. c. 3.

(C) How far Tenant for Life may dispose of his Estate, either singly by himself, or by joining with him in Reversion : And herein of his Forfeiture, either by Common Law or Statute.

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

Lit. § 56.

IF a man lets lands to one for term of life of the lessee, or any other, in this case the lessee is tenant for term of life ; but in common speech, he, who holdeth for term of his own life, is called tenant for term of his own life ; and he, who holdeth for term of another's life, is called tenant for term of another man's life, or tenant *per autre vie*.

Co. Lit.

41. b.

5 Co. 13. a.

Cro. Eliz.

182.

So, if a man lets land to another for term of his own life, and the lives of *A.* and *B.*, the lessee has a freehold determinable upon his own death, and the deaths of *A.* and *B.*, nor can there be any merger of the freehold during the lives of *A.* and *B.* into the estate that the lessee has during his own life ; because, though the estate for a man's own life is greater than an estate for another man's life, yet here the lessee has not two distinct estates in him, but only one freehold circumscribed with that limitation as the measure of its continuance.

Roll. Abr.

843. But if

a lease be

made to a

corporation

aggregate

If a lease be made to a corporation aggregate for life of the lessor ; this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance.

for their own lives ; this is no estate for life, but a fee-simple ; for the lease being made to them as a body politick, which has a continued succession, and never dies, a lease made to them during their lives is equal to a grant made to them while they continue a body politick, which by reason of the perpetual succession of its members is in law looked upon to be for ever ; and therefore, this is a good gift in fee, without the word *successors*, because the lessor cannot have the land against his own grant till the corporation is dissolved ; for till their dissolution they are in being and have a continuance, which is to be alive within the words of the lease. 21 E. 4. 76. Roll. Abr. 843.

Lit. § 283.

Co. Lit. 42.

183. Roll.

Abr. 846.

If a man leases lands to another, without saying how long the lessee shall enjoy them, he shall have them for his own life, if livery be made, because every man's gift is taken most strongly himself,

himself, and for the benefit of the grantee, to avoid all equivocation. But there is a difference between such a lease made by tenant in fee-simple and tenant in tail; for if tenant in tail makes a lease generally with livery, the lessee shall have the land but during the life of the tenant in tail, for that is the greatest estate he can lawfully make, the power to lease ceasing with his life; and where a man's act will bear different constructions, the law, for no consideration, will make that construction which must be injurious to another.

So, if lessee for term of his own life makes a lease generally with livery; this the law construes an estate for his own life only; for if it were to be taken an estate for the life of the lessee, the lessor, without any explicit act of his own, would not only discontinue the reversion, but also forfeit his own estate, which construction would make the conveyance useless and ineffectual; for it would be in the power of him in the reversion to enter into the land for the forfeiture; and the law will make no construction to do wrong, or in doubtful expressions presume a wrongful intention, it being also most for the benefit of the lessee, that he should have a rightful estate.

So it is of things which lie in grant, as rents, reversions, commons, &c. for if a man grants these things by deed, without mentioning any particular estate, the grantee hath an estate for term of his own life, because a man's own act is taken most strongly against himself; and where the words of the deed will bear two senses without injury to any one, the purchaser who comes in upon a valuable consideration deserves the most favour; and the construction that most enlarges his interest is to be preferred: besides, being granted to him, it cannot be supposed out of him, as long as the same person continues.

But if the king grants land or rent, and limits no particular estate in the gift, the patentee has no freehold, either for his own life or the life of the king.

It is known to make market of his titles, his grants proceeding from his own bounty, and not from any valuable consideration of the patentees, ought not to be taken in a larger sense than the words of themselves import; and therefore, where he has not explicitly set forth the extent of his bounty, the law, with reason, construes the grant in favour of the king, who is best judge of the services of his subjects, and how far he intended to reward them, where the words of the grant do not declare it; and therefore such grant, being capable of a double construction, is void for the uncertainty, and shall not pass so much as an estate at will; because most grants proceeding from the indulgence and application of the subject, they ought to know what they ask; and if that does not appear, nothing shall pass from the king for the uncertainty. Roll. Abr. 845. Dav. 43. 45. Co. 43. 49.

If an estate be given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in such a house, or shall pay 10*l.* yearly to the grantor; in all such cases, where there is no fixed time appointed for the determination of the estate conveyed, the grantees have estates for life, if the ceremony required by law to pass a freehold be observed; as if livery be made in case of things corporeal, or a deed be perfected in case of things incorporeal.

If

Roll. Abr.
844.

If I make a lease to another till I go to *Westminster*, the lessee has an estate for life. So if *A.* leases to *B.* till *A.* makes *J. S.* bailiff of his manor, *B.* has the freehold in him; for since there is no particular time specified, but it is left indefinitely, when I shall go to *Westminster*, or *J. S.* be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery transfers the freehold to him; so he must, consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time, upon which his estate is to determine.

Co. Lit.
42. a.
Roll. Abr.
844.
Cates in
Pail. 161-
2-3.
4 Mod. 173.

If an office be granted to a man, to have and enjoy so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office; for, since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life, since it must be his own act, (which the law does not presume to foresee,) which only can make his estate of shorter continuance than his life. So, if the office had been granted to a man *quandiu se bene gesserit tantum*, his estate had not been less for the word *tantum*; for a grant to a man for so long time as he shall behave himself well, and for so long time only as he shall behave himself well, are of equal extent, and his misbehaviour in each case determines his interest.

Co. Lit.
42. a.
Roll. Abr.
845.
6 Co. 35. b.

If a man grants a manor worth 10*l.* per annum to *J. S.* till he has received 100*l.*, this is an estate for life, if livery be made; for though at the time of the grant the manor be worth 10*l.*, and by that computation the 100*l.* must be paid in ten years; yet since the profits are uncertain, and may rise or fall, there can be no definite time fixed for the limitation of the lessee's estate; and therefore, since livery is made, he must have a freehold in the manor determinable upon the levying of the 100*l.*: but in this case, if no livery had been made, the lessee had been only tenant at will; for it cannot be a lease for years, because the determination of it is uncertain, and there can be no freehold without livery.

Roll. Abr.
845.
Co. Lit.
42. a.

But if I grant a rent of 10*l.* to *J. S.* till he has received 100*l.* this is an estate for years in the grantee, for the determinate sum, which is payable yearly, must necessarily in ten years amount to the 100*l.*, and, consequently, it is evident at the commencement of the grant, when the interest of the grantee is to determine.

Roll. Abr.
845.

If I grant to another common of turbary in my land, to dig and carry away at his will, there being no particular estate limited in the grant, it must be construed in favour of the grantee, to continue during the life of the grantee, for the words, *at his will*, cannot refer to the estate in the common, but to the privilege given to the grantee to dig and carry away, which by the grant he may use at his will and pleasure.

Roll. Abr.
845.

If a man seised of land in right of his wife for life, bargains and sells it by indenture enrolled, the purchaser has an estate for his life determinable upon the coverture; for the conveyance being by bargain and sale transfers no more than the husband may lawfully pass, which is an estate during the coverture; for so

long

long he has an estate in the freehold of his wife, and may lawfully dispose of it; and since it cannot be foreseen when the coverture will be dissolved, the lessee must, consequently, have the freehold determinable with the coverture, since the bargain and sale upon the statute is equivalent to livery at law, to transfer the freehold.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office; this is no absolute estate for life, because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined, because it was first granted for the exercise of the office which he is no farther concerned in.

Co. Lit.
42. a.

And here it may be proper to observe, that though, by the common law, the investiture of livery was the only solemnity required to convey the freehold, yet now, by the statute of *frauds and perjuries*, it is enacted, *That all leases, estates, interests of freehold, &c. in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect.*

29 Car. 2.
c. 3.

(B) Who upon the Death of Tenant for Life is to enjoy the Land: And herein of Occupancy*.

* Few if any of the following cases as to

occupancy are now law, since the alterations by statute, which *vide post*. But they shew the learning relative to occupancy, which may, on some occasions, be of use.

IF a man leases to J. S., and J. S. dies, the land returns to the lessor, because, the life being spent for which the land was granted, it must necessarily come back to the old proprietor. But if the lease had been made to J. S. during the life of A. and the lessee had died living *cestui que vie*; or if in the former case J. S. had granted over his estate to B., and B. had died; in these cases, he that first took possession of the land was lawfully the tenant; for the reversioner could not claim in either case, because he had parted with it during the life of A. in one case, and of J. S. in the other; and J. S. cannot have any right, for that were to act contrary to his own grant, and to claim an interest which he had transferred to another; and the tenant *pur autre vie* being dead, his descendants could not claim it, because they were not comprehended in the words of the feudal donation; and therefore the first occupant must be the rightful tenant, since this, like all other things which are derelict and without an owner, belongs to the first occupier or possessor. But, the better to understand this matter, we shall consider,

Co. Lit.
41. b.
Cro. Eliz.
182.

1. What Things a Man may make himself a Title to by Occupation.

2. What makes an Occupant.

3. The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law, by the Statute 29 Car. 2. c. 3.

1. Of what Things a Man may make himself a Title to by Occupation.

Vaugh. 199,
200.

Co. Lit.

41. b.

2 Roll.

Abr. 150.

Cro. Eliz.

721. c. 01.

[(a) That is, no general occupant; for Lord Coke writes in Co. Lit. 588. a.

There can be no occupant (a) of things which lie in grant, and which cannot pass without deed, as rents, advowsons, commons, reversions, &c. because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society for their being, no man can enter to possess them. Besides, as these things are framed and have their existence by the municipal laws of the nation, so those laws have established the solemnity of a deed to transfer them; from whence it follows, that, since no man can make himself a title to these things without deed, whoever claims them must shew he is a party to the deed before he can derive himself a title to the things contained in the deed.

that if heirs are named in the grant of a rent *pur autre vie*, they shall take, though this was formerly doubted. Dy. 186. ed. in marg. 1 Bulstr. 155. Mo. 625. 664. Godb. 172.]

Vaugh. 199.

Therefore, if a rent be granted to *A.* during the life of *B.*, and *A.* die, living *B.*, the rent is determined; because the grant being originally made to *A.* only, when he dies, no body can claim it as occupant, because there can be no entry into it to possess; nor by the deed, because no one was party to it but *A.*; it must follow, therefore, that when nobody can take by the grant, it must cease as a void grant, or as if it had never made; and, consequently, the reversion must necessarily commence.

Vaugh. 200.
Mo. 664.

If a rent be granted to *A.* during the life of *B.*, remainder to *C.*, if *A.* dies living *cestui que vie*, the remainder which was limited to *C.* commences immediately; for the particular estate in the rent must determine, when nobody can enjoy it; and, consequently, the remainder must take place, which was to commence upon the determination of the particular estate.

Cro. Eliz.

721.

Crawley's

case. Dy.

186. a. in

marg. S. C.

But if a rent be granted to *A.* and *B.* during the life of *C.* to the use of *C.*, if *A.* and *B.* die, *C.* shall enjoy the rent during his own life; for the rent granted to *A.* and *B.* to the use of *C.* is by the statute of uses executed in *C.* as an estate for his own life; so that the lives of *A.* and *B.* are no ways material; for the estate being executed by the statute to the use which was limited to *C.* during his own life, he must by the grant, notwithstanding the death of *A.* and *B.* enjoy the rent during his own life.

2 Roll. Abr.

86. 403.

Cro. Jac.

606.

Eafface and

Newen.

Sir Wm.

Jones, 55.

S. C.

If there be two jointenants for life, and one be a feme covert, and the baron and feme levy a fine to the other jointenant, and thereby grant *totum & quicquid* in the land, for the life of the wife; upon the death of the other jointenant, there shall be no occupant during the life of the feme, but the feoffor may enter; for the fine inured by way of release, and then the other jointenant must have

have claimed the whole from the first feoffment, so could have had the whole but for his own life.

But though there be no occupancy of things which lie in grant, yet they may be occupied as appendant to things which pass by livery, and which may be occupied; as, if a manor consisting part in demesne, and part in services, be leased to *A.* for the life of *B.*, upon the death of *A.* whoever first enters and occupies the demesnes has also the services: so, the occupancy of a manor is the occupation also of the advowson appendant to the manor; for though neither the services nor the advowson are separately in their own nature capable of an occupancy, yet as they belong and are appendant to land which is subject to occupation, the occupant of the demesnes has a right to the whole manor, because the occupancy making no severance or alteration in the manor, he, that has a right to the whole manor by occupation, must necessarily have a right to all its rights. Vaugh. 196.

So, the occupant of a house shall have the estovers, or way leading to the house; for since these things pertain to the house, and the occupation of the house makes no severance of them, they must necessarily remain as they were before the occupant entered, and then the possessor of the house enjoyed the estovers or way also. Vaugh. 196.

If a lease be made of lands to *J. S.* for life, *habend.* to him, and *A.* and *B.* successively, *A.* and *B.* cannot take the lands in possession, because not named in the premises, nor by way of remainder, because the intent of the deed appears to give it them in possession by the copulative words, and by joining them with *J. S.*, who is to take in possession: nor can there be any occupancy upon the death of *J. S.*, because *A.* and *B.* are mentioned in the deed, as persons to take an estate, and not to make a limitation of the lands to *J. S.* during their lives; so that the lease in effect is no more than to *J. S.* during his own life, and, consequently, upon his death it must return to the lessor, since the life is spent for which he granted it. Cro. Eliz. 57.
Hob. 313.
Windmore and Hubbard.

If tenant in dower, or by the curtesy, of lands, grant over their estate, and the grantee dies during their lives, whoever first enters shall be occupant; for though their estates are created by law, yet since they are to enjoy them during their own lives, the reversioner has no right to enter till their deaths; nor can they enter upon the death of the grantee, because this were to act contrary to their own grant, which conveyed their estates during their own lives; consequently, since the possession is vacant and derelict by the death of the grantee, he that first enters to possess is the occupant, and shall enjoy the land during the life of tenant in dower, or by the curtesy, though they cannot be said to be tenants in dower, or by the curtesy. Co. Lit. 41.
2 Roll.
Abr. 150.
Palm. 32.
Vide Cro. Eliz. 58.

If a lease be made to *A.* and *B.* for their lives, and the life of the longest liver of them, and they make partition, and then *A.* dies, the lessor shall enter into his part; and there can be no occupancy; for *B.* has no title to it, because the right of survivorship was lost by the partition which destroyed the jointenancy; nor will the words *to the longest liver* be of any use to *B.*, because 2 Roll.
Abr. 150.

they were void at first, being no more than the law employed in the joint estate: besides, after the partition, each of the lessees have but an estate for his own life in the several moieties, and, consequently, the reversion, which is to commence when the particular estate determines, must necessarily take place, for there can be no occupant where another has right, as the reversioner has in this case upon the death of *A.* and *B.*

Co. Lit. 41.
2 Roll.
Abr. 150.

There can be no occupant of any of the king's possessions; for if the king grants lands to *A.* during the life of *B.*, and *A.* dies, living *B.*, the law allows no man to gain the possession which is now vacant by the death of *A.*, but preserves it for the king; for, he being employed in the care and business of the whole nation, ought not to suffer in his private estate and concerns: besides, no man can make himself a title to any of the king's possessions without matter of record.

2. What makes an Occupant.

Vaugh 188.

Occupancy in land being nothing else than the taking possession or appropriating of that part which every man had a right to as much as another, it follows, that a claim without an actual entry makes no occupation, because, notwithstanding the claim, the possession is still vacant, and such claim leaves no marks of an appropriation; besides that, since the occupancy in civil societies follows the natural, and a mere claim makes no natural occupancy, because a man's natural right extends no farther than possession and use, and not to what he may only wish for, by consequence, if a claim doth not remove it out of the state of nature, the occupancy in civil societies, according to the nature of things, must be an actual possession, and not a bare claim.

Co. Lit.
41. b.

Riding over the ground to hunt or hawk makes no occupancy; for though this be an actual entry, yet (being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider) can gain no occupancy; the intention of the person being to denominate his action according to the rule *quod affectio tua imponit nomen operi tuo*.

Vaugh. 189.
191. Cro.
Jac. 554.
Co. Lit. 4.

If *A.* tenant *pur auter vie* leases to *B.* at will, and *B.* enters and is possessed, and then *A.* dies, and *J. S.* enters as occupant, yet he is no occupant, because the possession was taken up by *B.* before, and *B.* being found in possession (which prevents any other occupant) the law casts the freehold on him, not only to prevent any abeyance, but that there may be a tenant to do the services, and to answer to the *precipe* of strangers.

2 Roll. Abr.
151.
2 Bulst. 12,
13.
Vaugh. 194.
Comp. In-
carn. 332.

If tenant *pur auter vie* makes a lease for years, and dies, the lessee for years being in possession shall be occupant without any act of his declaring his intention to be so; for being already in possession, the law does not put a man to claim or enter into that of which he has already possession, and in whomsoever the law finds the possession, there it casts the freehold for the former reasons: nor is the lessee for years injured by it, for he purchased his

his estate subject to this contingency of being merged by occupancy.

But if tenant in fee-simple makes a lease for years to *J. S.* and after ousts him, and makes a lease to *A.* for the life of *B.*, *J. S.* re-enters, and *A.* dies, the lessee for years is no occupant; for though he is found in possession, yet it is by a title superior to the lease for life, and since he did not purchase the term at first under the contingency of a merger by occupancy, the law will not permit the lessor by any act of his to destroy the title he himself made; nor will the law merge the term, for that were to destroy the prior title of *J. S.* contrary to the rule of law, that *actus legis nemini facit injuriam*.

If *A.* tenant *pur auter vie* leases to *B.* for years, and *B.* makes a lease at will to *C.*, if *A.* dies, living *cestui que vie*, *C.* shall be the occupant, because, being in possession, the law gives him the freehold; and though *B.* should enter upon him and claim as occupant, yet that would make no alteration in the case, because *C.* becomes occupant immediately on the death of *A.*, and what one man is already possessed of, another cannot gain by occupation, for occupancy only gives a right where no man had it before, but the term of *B.* is still in being, because *C.* is to have the freehold as *A.* enjoyed it, which was, subject to the lease for years.

If tenant *pur auter vie* makes a lease for twenty years to *B.* reserving 5 *l.* rent, and *B.* leases to *C.* for ten years, reserving 3 *l.* rent, if the tenant for life dies, *C.* shall be occupant, because he is in possession, but yet he shall have the freehold only as a reversion on the lease of twenty years; and therefore, since the term of ten years is not merged, *C.* must pay the 3 *l.* to *B.*, and *B.* must pay the rent of 5 *l.* to *C.*, because *C.* as occupant comes in the place of tenant for life in all respects, and must answer the services over, is subject to the conditions, and to all charges of tenant for life, and consequently, ought to enjoy all the benefit and profit of it.

So, if tenant *pur auter vie* makes a lease for years to *A.*, remainder to *B.* for years, and the lessee for life dies, *A.* shall be occupant and have the freehold, because the law finds him in possession: but his term is not merged, by reason of the intermediate interest of *B.* which he must preserve; because, coming in the place of the tenant *pur auter vie*, he is obliged to take the freehold under the charges he laid on it, and in the same manner he enjoyed it, which was subject to the lease for years; and therefore, though the freehold be cast on him, yet he holds it by way of reversion upon the remainder for years.

If tenant *pur auter vie* dies, and *J. S.* first enters, and claims in right of *J. D.*, yet *J. S.* himself shall be occupant, because the freehold, being cast on him who first takes possession, cannot be devested out of him without a solemn act of notoriety.

If tenant *pur auter vie* makes a lease for years to *A.* in trust for himself for life, and after his death in trust for his wife for her life; *A.* enters, but suffers the lessee for life to enjoy the land; the

Co. Lit.

41. b.

2 Roll. Abr.

151.

2 Roll. Abr.

151.

Co. Lit.

41. b.

2 Bull. 11.

Dyer, 323.

in marg. ne.

Com. In-

cum. 343.

Co. Lit. 41.

Vaugh. 190.

3 Bull. 12.

151.

2 Roll. Abr.

151.

Vaugh. 192.

2 Bull. 11.

Lev. 202.

Sid. 346.

2 Keb. 143.

lessee for life dies, and the wife finding the possession vacant enters, she is the occupant; for though upon the death of tenant for life (whom he suffered to enter and take the profits) he had so far a possession in law before any actual entry, that he might have an action of trespass; yet that made him no occupant, because nothing but an actual possession makes an occupant, which the wife first took in this case.

3. The Way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 Car. 2. c. 3.

Lit. § 739.
Co. Lit.
41 b.
388. a.

If lands be given to the lessee and his heirs, during the life of another, the heir comes in as special occupant upon the death of the tenant for life, because he is included in the words of the donation, which gave him a right to the land upon the death of the lessee, and consequently prevents an occupancy, which is admitted in other cases, because no man has a title to the vacant possession.

2 Roll.
Abr. 151.

So, if lessee for his own life leases to *B.* and the heirs of his body, during the life of the first lessee; if *B.* dies during the life of his lessor, the heirs of his body shall be occupant.

2 Roll.
Abr. 150.
18 E. 3.
44. b.

So, if the lessee had made such a lease to his lessor, and the lessor had died during the life of the lessee, the heir of his body shall be occupant; for this is no surrender, because the first lessee has a possibility of reverter upon his lessor's dying without heirs of his body.

2 Ven. 184.
If tenant
pur auter vie
settles the

Tenant *pur auter vie* may limit the term to a man and his heirs, or to the heirs of his body, and such estate shall descend, and is not within the statute *de donis*.

term to the use of himself in tail, remainder to *J. S.* equity will not support such remainder for the benefit of *J. S.* Vern. 225-6.

2 Lev. 138.
3 Keb. 475.
486.
Vaugh. 201.

If lands in borough-english be given to *A.* and his heirs for the life of *B.*, and *A.* die in the life of *B.*, leaving two sons, the youngest shall be the special occupant, because the heir, that is representative of the father as to land of that nature, must be the occupant, since the heir must take by descent, and not by purchase.

Dyer, 328.
2 Roll. Abr.
151., and
it was assents
in their
hands be-
fore the stat.
29 Car. 2.

If a lease be made of *land* to *J. S.* his executors and assigns, during the life of *B.*, the executors of *J. S.* shall be the special occupants, if he dies in the life of *B.*; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person, because the parties themselves, who originally had the possession, have filled it up by this appointment.

c. 3.
2 Vern. 720.
[1 Atk. 466.

And now since the statute, if an estate *pur auter vie* be limited to a man, his heirs, executors, administrators and assigns, and be not devised, it descends to the heir as a special occupant, and of course the personal representative of the person last seized cannot recover the title deeds from the person last seized. *Atkinson v. Baker*, 4 Term. Rep. 219.]

2 Roll.
Abr. 151.

But if a *rent* be granted to *J. S.* and his executors, during the life of *B.*, by the death of *J. S.* the rent is determined, because the

the

the executors cannot take as special occupants, since the nature of the thing lying in agreement is not capable of occupation, nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold; and the law will not permit people at their pleasure to vary the course of descents.

So, if a rent be granted to *A.* his executors and assigns, during the life of *B.*, and *A.* die intestate, the administrator cannot claim the rent; not as occupant, because no man can make himself a title to rent by way of occupancy: not by the deed, because he is not assignee within the words of the grant by the letters of administration, therefore the rent is determined, since none can claim it as occupant.

Yet if the rent be granted to a man and his heirs during the life of another, and the grantee die, his heirs shall take as special occupants; for though in point of property the rent is not capable of occupation, yet since the heirs are included in the grant, and they are capable of taking the freehold as representatives of the grantee, which the executors are not in the former case, it is but reason the rent should not determine while any person comprised in the grant is capable of taking.

So, if an annuity be granted to *A.* and his heirs during the life of *B.*, if *A.* die before *B.*, his heirs shall have the annuity, because the heirs of *A.* being the proper representatives to take the freehold descending from him, since they are comprised in the grant, the grant cannot cease or be void while they are in being, and the life not spent for which the grant was made.

But though all or most of the above cases might formerly have been good law, yet now by the statute of *frauds and perjuries* it is enacted, That any estate *pur auter vie* shall be devisable by will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as (a) affects by descent; as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be affects in their hands.

administration is granted to *J. S.* the administrator is not obliged to distribute this term amongst the next of kin, as part of the intestate's personal estate, but shall have it himself as occupant, for it still continues a freehold; and the alteration made by the 29 Car. 2. c. 3. was only with respect to creditors, that is, if it comes to the heir as special occupant, he shall be answerable for his ancestor's debts as far as he is bound; and if to executors or administrators, they for all debts generally; but it shall not be affects to pay legacies, except such as are particularly devised thereout. Mich. 8 Will. 3. in B. R. between Oichun and Pickering. 2 Salk. 464. *per totam curiam*. But see now 14 Geo. 2. c. 20. § 9. whereby distribution shall be made of estates *pur auter vie*, whereof there is no special occupant, and which are not devised.

Vaugh. 199.
200. Cro.
Eliz. 901.
Mo. 664.
Yelv. 9.
Salter and
Butler.

Vaugh. 201.
2 Roll.
Abr. 151.
Bult. 135.
Cro. Jac.
282. Bowles
and Poole.
Yelv. 9.

Bult. 135.
Co. Lit.
388. a.
2 Roll.
Abr. 151.

29 Car. 2.
c. 3. § 12.
(a) But shall
be affects only
to pay debts
by bond or
specialty, in
which the
heir is
bound, and
not debts
by simple
contract.
2 Vern. 710.
If tenant
*pur auter
vie* dies in-
testate, and

(C) How far Tenant for Life may dispose of his Estate, either singly by himself, or by joining with him in Reversion: And herein of his Forfeiture, either by Common Law or Statute.

Digest. Feud.
lib. 2. tit.
26. fol. 523.
Vigellius,
lib. 5.
Causé, 32.
f. 287.
Staunf.
Præf. 28. a.
(a) 1st, In
remuneratio-
nem servitii,

BY the ancient feudal law no man could alien without licence from the lord of the fee; but any alienation or disposition was then a forfeiture; but in *England*, where the allodial property prevailed in the *Saxon* times, they were allowed to alien in (a) some cases, which privilege was not only confirmed, but also enlarged and made general by *magna charta*; so that by that act the feuditary might alien to whom he pleased, provided he left sufficient to answer the lord's services, which seems to have been a privilege mightily contended for.

that is, for services done to the feud, as for services done in the wars by the feudal tenant, or in peace, by ploughing the feud at home; both these being either for the profit or honour of the feudal lord, they formerly valuing themselves upon the number and honour of their tenants. 2dly, In frank marriage with the daughter of the feuditary, or some other of his blood, because this multiplied tenants to the lord. 3dly, In frankalmoinage or free alms, the superstition of the times allowing it for the good of the soul. Glanvil, lib. 7. cap. 1. 4+. Staunf. Præf. 27, 28.

2 Inst. 65.
Roll. Abr.
854. Co.
Lit. 251.

Yet notwithstanding this law, if tenant for life aliens in fee, this is still a forfeiture, for that statute only permits a lawful disposition, but does not allow any alienation to the prejudice of him in reversion, and therefore where tenant for life takes upon him to transfer the fee-simple, it is a renunciation of the feud, and contrary to his oath of fidelity. So, if tenant for life aliens to another for the life of the alienee, this is a forfeiture, for it can be no lawful alienation within *magna charta*, because it is palpably to the prejudice of him in the reversion.

Roll. Abr.
854.

If *A.* lessee for life leases to *B.* for the life of *B.*, if *A.* lives so long; this is a forfeiture of *A.*'s estate, because *B.* has an estate for his own life, though under a contingency, which must necessarily divest the reversion.

Cro. Jac.
100. Castle
v. Dod.
Roll. Abr.
854.

But if *A.*, lessee for life, levies a fine to *B.* for the life of *A.* to the use of *B.* for his own life, this is no forfeiture; for the estate granted by the fine was only for the life of *A.*, and the limitation of a greater use can be no forfeiture, for the estate out of which the use arises is only during the life of *A.*

Cro. Eliz.
131. Piers
and How.
So, if baron
and feme be
tenants for
life, and
they both
join in a
seottment,
or the hus-
band alone;

Husband seised of lands in right of his wife for life, and they both by deed of feoffment convey the land to *J. S.* and his heirs, *habend* to him and his heirs, to the use of him and his heirs, for the life of the wife; this is a forfeiture of her estate; for there being a fee-simple conveyed to *J. S.* by the deed and livery, the words of restraint for the life of the wife refer only to the limitation of the use, so that the fee-simple remains still in the feoffee; but this it seems is a forfeiture only during the coverture.

these are forfeitures, but they affect the wife only during the coverture; for she can be bound by no act of hers without examination in the court of record. Roll. Abr. 851. 3 Co. 44.

If tenant for life makes a lease for years, this was never looked upon to be a forfeiture, because the lessee for years was originally but a bailiff to the freeholder, and the tenant for life only had the freehold, and was to answer the services, and he in reversion was nowise affected by it, because there was no investiture or other act of notoriety done to dispossess him of his reversion. But upon the death of tenant for life the termor's interest ceased, because the person from whom he derived his authority as bailiff being dead, the authority must necessarily cease with the person that granted it; and in this case, if tenant for life enters upon his lessee, and makes a feoffment to another, this is a forfeiture of his whole estate, but the term for years continues, because the wrongful act of tenant for life shall not prejudice a stranger's interest; and if he in reversion enters, he must take it subject to the charges he had power by law to lay on it; yet in this case, if tenant for life had entered and committed waste, this had been a forfeiture of his estate, and the term had been lost too; but this is by the express words of the statute of *Gloucester*, which gives the place wasted as a penalty to him in reversion, and cannot be done if the term continues notwithstanding the waste.

8 Co. 45.
Co. Lit.
233. b.

But for this
vide tit.
Waste.

Of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any disposition or act *in pais* forfeit them; and therefore, if a man seised of a rent, advowson, or common for life, grants them by *deed* to another in fee, this is no forfeiture, for this can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original grant made to his grantor, by which it must appear what interest he had, and consequently, what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make, and so he in reversion can receive no prejudice.

Co. Lit. 251.
Co. 1.
Roll. Abr.
854.

So, if tenant for life of lands, by indenture enrolled, bargains and sells them to *J. S.* and his heirs, this is no forfeiture, but the bargainor passes only what he may lawfully pass; for though by the statute 27 *H. 8. c. 10.* deeds enrolled grew a common conveyance for transferring of lands, which could not pass at common law without the investiture of livery; yet being a manner of conveyance known before at common law, it was construed to have no new effect given it by the statute, but what the statute expressed.

6 Co. 14. b.

But if a man be seised of a manor for life, to which an advowson is appendant, and he alien one acre, or the whole manor, with the advowson in fee; this is a forfeiture of the advowson; for as it is a forfeiture of the acre or manor to which it is appendant, so it must be also of the advowson, since the alienation makes no severance of them.

Roll. Abr.
854.

If lessee for life of lands aliens in fee upon condition, and enters for the condition broken, yet the lessor may enter for the forfeiture.

Roll. Abr.
856.
Co. Lit. 252.
Palm. 202.

So, if tenant for life aliens upon condition, that if he himself pays 10 *l.* that he shall re-enter, and that

if he fails in payment, that then the alienee shall have the fee-simple; though he pays the money, yet the reversioner may enter for the forfeiture, because the fee was transferred immediately upon the alienation, which was a renunciation of the feud, and consequently a forfeiture. Roll. Abr. 856.

Co. Lit.
251. b.

If tenant for life levies a fine, by which the reversion is devest-
ed; this is a forfeiture, because it is a more solemn renunciation
of the feud than any alienation *in pais* can be.

Roll. Abr.
852.

Co. Lit. 251.

So it is of a rent, advowson, or any thing else that lies in grant:
for if tenant for life of them levies a fine, it is a forfeiture: for
though the fine being of a rent, &c. passes no more than it may
lawfully pass, yet being a publick and solemn renunciation of the
estate for life, in a court of record, this amounts to a forfeiture,
and so differs from a grant *in pais*.

Vigellius
Cause, 32.
f. 287-8.

Another way of forfeiture in a court of record is, by claiming
a greater estate than he had by the feudal donation, or by affirm-
ing the reversion to be in any other person than his lord. This
seems to be grounded on a rule in the old feudal law, that if a
vassal denied that he held the feud of his lord, and it was proved
against him, such denial was a forfeiture. Now this denial may
be when the vassal claims the reversion himself, or accepts a gift
of it from a stranger, or acknowledges the reversion to be in a
stranger; for in all these cases he denies that he holds the feud
from the lord: but, as by the feudal law, the vassal was to be
convicted of this denial, so in our law these acts which plainly
amount to a denial must be done in a court of record, to make
them a forfeiture; for such act of denial appearing on record is
equivalent and equally conclusive as a conviction upon solemn
trial; and all other denials, that might be used by great lords for
trepanning their tenants, and for a pretence to seize their estates,
by our law were rejected, for such convictions might be made by
such great lords where there was no just cause: but the denial of
the tenure upon record could never be counterfeited, or be abused
to any injustice; and therefore this notorious and solemn act of
the tenant was retained as a just cause of forfeiture by our law.

7 Co. 55.
Co. Lit.

251. b.

So, if in a
quid juris
clamat
brought
against him,
he claims
the fee-
simple; this is a forfeiture. Roll. Abr. 853. 2 Co. 68. b.

And therefore, if tenant for life be disseised, and bring a writ
of right, this is a forfeiture of his estate; because by suing a writ
of right he admits the reversion in fee to be in himself, and by
consequence denies that he holds over. So it is, if, in a writ of
right brought against him, he should join the mise on the mere
right; for by taking upon him the privileges of tenant in fee, he
admits the inheritance in him, which is a denial of the tenure.

Dyer, 148.
Co. Lit. 252.
Roll. Abr.
852.
9 Co. 106.

If tenant for life accepts a fine *come ceo*, &c. of a stranger, this
is a forfeiture of his estate; for this is a denial of the tenure on
two accounts: 1st, In admitting the reversion to have been in the
stranger to convey. 2^{dly}, In accepting of it himself to the pre-
judice of him in reversion.

2 Lev. 202.
Smith and
Abell.

If *A.* be tenant for life, remainder to *B.* for life, and *A.* levy
a fine to *B.*, this is a forfeiture of both their estates; for by their
own act on record, they have denied the reversion to be in the
lord, the first by giving, and the latter by receiving it.

If tenant for life be disseised, and the disseisor make a lease at will, and tenant for life levy a fine *come ceo*, &c. to the lessee; this is a forfeiture, and he in the reversion, though he had but a right, may take advantage of it.

If a stranger bring an action of waste against tenant for life, and the lessee plead *nul waste fait*, in bar to the action; this is a forfeiture, because by his plea he admits the stranger to be the proper person to punish the waste, if there had been any committed.

If the demandant in a real action recovers against the tenant for life by default or *nient dedire*, or by pleading covenantously to the disherison of him in the reversion; these are forfeitures of his estate; for tenant for life is intrusted with the freehold, and is to answer to strangers *precipes*, and defend his own as well as the reversioner's interest; but when he gives way to the demandant's action, he admits the right of reversion to be in him, and, by consequence, denies any tenure of his reversioner, which is a forfeiture.

If tenant for life prays in aid of him in reversion, and has it granted him, and J. S. comes into court without process, and says, he is the person of whom aid is prayed, and that he is ready to join in aid; but tenant for life denies him to be the person, and is adjudged to answer sole; if this be the person that has the reversion, tenant for life has forfeited his estate by his denial of him, because the prayer in aid being always of him in reversion, and the tenant denying him to be the person of whom he prayed in aid, he has denied the reversion to be in him, and, consequently, has denied to hold of him. So it is if he had at first prayed in aid of a stranger; this had been a forfeiture for the same reason.

If a stranger grants the reversion by fine, and the conusee brings a *quid juris clamat* against the lessee, who attorns to the grant; this is a forfeiture, because he thereby admits the reversion to be in a stranger; but if he be erroneously adjudged by the court to attorn, and he does it in obedience to the court, this is no forfeiture, because he was bound by the judgment to attorn and did nothing wilfully to the prejudice of him in reversion.

Where he in reversion is party to the conveyance, there, tenant for life may by solemn investiture convey a greater estate than he had by the first feudal contract: as, if *A.* tenant for life makes a lease to *B.* who is in reversion, for the life of *B.*, this is neither a surrender nor forfeiture: not the first, because *A.* has not wholly parted with his own estate, but hath left a reversion in himself after the death of *B.*, who may possibly die first; and therefore if *B.* takes a wife, she shall not be endowed of such estate, because *B.* is but tenant for life by the conveyance: a forfeiture it cannot be, because he in reversion is party, who cannot take advantage of it as a forfeiture, contrary to his own concurrence and approbation, for that were to render his own act void and ineffectual.

2 Co. 55.
Moor, 423.
Buckler's
case. Co.
Lit. 252. a.
Co. Lit. 252.
Roll. Abr.
853.

Co. Lit.
252. a.
Roll. Abr.
853.

Roll. Abr.
853.
Co. Lit. 252.

Co. Lit.
252. a.
Roll. Abr.
853.

Co. Lit.
42. a.

Co. 76. b.
Co. Lit.
42. a. S. P.

If *A.* tenant for life enfeoff *B.* in remainder for life ; this is a surrender ; for a forfeiture it cannot be, because *B.* in remainder was party, and *A.* can have no reversion, because he conveyed the whole estate.

4. Aff. pl. 2.
Co. 76. b.
Co. Lit.
42. a.
Roll. Abr.
355.

But if *A.* be tenant for life, remainder to *B.* in tail, remainder to *C.* in fee, and *A.* make a feoffment to *B.* and his wife, and their heirs, and then *B.* die without issue, *C.* may enter for the forfeiture : for this could be no surrender, because the feme, who had no interest in the land, was party to the feoffment, and she must claim under the feoffment, which being made to a stranger, must necessarily divest the remainder, which is a forfeiture of *A.*'s estate, and, consequently, *C.* may enter, since the estates of *A.* and *B.*, which hindered him, are spent and determined.

Roll. Abr.
357.
2 Co. 140.

Therefore, if tenant for life, remainder in tail, remainder in fee, and the tenant for life enfeoffs him in the last remainder, the mean remainder-man may enter, because this divested his remainder, and by consequence was a forfeiture.

Roll. Abr.
355.

If tenant for life makes a feoffment in fee to baron and feme, seised of the reversion in right of the feme ; this can be no surrender ; for whatever vests in the husband by the feoffment, must necessarily be divested out of the wife, and when she enters into the land she is remitted to her former right.

Roll. Abr.
355.
Co. Lit.
42. a.

If baron and feme, seised in right of the feme for life, lease for life by indenture to him in reversion, being within age, for the life of the husband ; this is a forfeiture ; for though he in reversion be party to the lease, yet being an infant he is not bound by the contract to his own prejudice ; but if he in reversion had been of full age, the lease had been good, because he had dispensed with the advantage of the forfeiture by his acceptance of the lease.

Co. 76.
6 Co. 15. a.
Plow. 140.

The next thing to be considered is, where tenant for life and he in reversion join in the conveyance : and this has a different operation, as the feoffment is with or without deed ; for if it be without deed, then this is construed to be a surrender of the estate for life, and the feoffment of him in reversion, for no other interpretation can make the feoffment effectual ; for if the estate passes from the tenant for life to the feoffee, it will be a forfeiture of his estate, whereof he in reversion may take advantage, notwithstanding his joining ; for he having only the reversion had nothing to do with the freehold, and by consequence could make no feoffment or livery : and it cannot be a grant or confirmation of him in reversion for want of a deed : therefore, to make it effectual, it is construed the surrender of the tenant for life, and the feoffment of him in reversion.

Co. 76.
Plow. 140.

But if tenant for life and he in reversion join in a feoffment by deed, then each passes only his own estate ; the tenant for life the freehold in possession, and he in reversion his reversion : and this cannot be a forfeiture, because he in reversion joined in a proper conveyance to transfer his reversion ; and having passed it to another, has no interest left to entitle him to take advantage of the forfeiture, if it was one.

So,

So, if tenant for life, remainder in tail, join in a feoffment by deed; this is no discontinuance, but each gives only his own; and upon the death of tenant for life and him in remainder in tail, the issue, or those in reversion may lawfully enter, because then the estate that passed is determined: but if such feoffment had been by parol, then it had been the surrender of the tenant for life, and the feoffment of him in remainder, which would have made a discontinuance.

Co. 76. b.
77. a.

A. tenant for life, remainder in tail to *B.*, remainder in tail to *C.*, *A.* and *B.* join in a fine *come ceo, &c.* to a stranger; this is neither a discontinuance nor forfeiture, for each gives what he may lawfully dispose of; the tenant for life his estate, and *B.* a fee determinable on his estate-tail; and to prevent any discontinuance or forfeiture, it shall be first construed to be the grant of *B.* in remainder, and then of *A.* the tenant for life.

Co. 76.
Bredon's
case. Cro:
Eliz. 827.
Mo. 634.
Vent. 160.

But if *A.* tenant for life, and *B.* in remainder for life, join in a feoffment; this is a forfeiture of both their estates, and he in remainder or reversion may enter presently, because this feoffment passed a greater estate than both of them could lawfully make, and consequently must vest the reversion or remainder in fee, and so amount to a forfeiture. So it would be if a remainder had been to *C.* in tail, remainder to the right heirs of *B.* for the feoffment conveying a fee in possession, which *B.* had not in him, must necessarily vest the remainder to *C.*, and, consequently, be a forfeiture, whereof he may take advantage.

Dyer, 339.
Roll. Abr.
855.
1 Co. 76.

So, if *B.* in remainder for life, with such last remainder to his right heirs, levy a fine *come ceo, &c.* to a stranger; this is a forfeiture of his remainder for life, because the fine conveys a fee-simple in possession by estoppel, against which he can make no averment; or by making fractions of the estate, say, he only pass an estate for life *in presenti*, with a fee-simple expectant on the death of *C.* without issue, because the fine supposes a precedent gift in fee-simple, which he could not lawfully make whilst the estate for life of *A.* and the intermediate remainder of *C.* in tail were subsisting; and therefore such fine is a forfeiture, though during the life of *A.*, *C.* can take no advantage of it.

[Between
Garret v.
Blizard,
Roll. Abr.
855. Sty.
192. S. C.
the court
divided; and
the reporter
says, *Qu.*
What judgment
was
given? S. C.
cited in Sir
3 Keb. 733.]

Wm. Jon 65. 70.

Tenant for life, the reversion in fee being an infant, they both join in a fine, which is afterwards reversed by the infant for his nonage; yet the donee shall hold during the life of tenant for life, because distinct interests passed from each of them, and the defect in one shall give no advantage to the other.

Co. 76. b.
Vent. 160.

If tenant for life and he in reversion join in a gift in tail, reserving rent; this can be no forfeiture; because he in the reversion joined, and the tenant for life shall have the rent during his life, because the rent comes in lieu of the land, and therefore shall go according to the estates they had respectively in the land.

6 Co. 15. a.

Tenant for life and he in reversion join in a lease for life, the lessee commits waste, they both shall join in an action of waste, and the tenant for life shall recover the place wasted, because he in reversion

Co. Lit.
42. a.

reversion by joining hath admitted a reversion to be in the tenant for life, and consequently the forfeiture to belong immediately to him: but he in the reversion shall have the treble damages, because they are given for the waste and destruction done to the inheritance wherewith the tenant for life has nothing to do.

Co. Lit.
42. a.

If *A.* and *B.* jointenants, and to the heirs of *B.* join in a lease for life, *A.* has a reversion, and shall join in an action of waste; but the writ must be *ad exhereditationem* of *B.*, because he only hath the inheritance.

6 Co. 14. b.
Trepot's
case.
Mo. 72.
Co. Lit.
45. a.

If *A.* tenant for life, and *B.* in remainder in fee join in a lease for years by deed; this, upon the delivery of the deed, is the lease of *A.* during his life, and the confirmation of *B.* for *A.* being tenant in possession, the possession could only pass from him; and the lease being made by deed carries the approbation of the reversioner, and therefore is construed his confirmation; and therefore, where the lessee declared of a joint demise by *A.* and *B.*, it was adjudged he had failed of his title, because during the life of *A.* it was only his demise, and *B.* having only an interest in reversion could give the lessee no interest in possession.

Dyer, 234.
b. 235.
Mo. 72.
Newdigate's
case.
6 Co. 15. a.
Co. Lit.
45. a.

But in this case, upon the death of *A.*, it becomes the sole demise of *B.*, for it can be no longer the demise of *A.*, who is not in being, and whose interest in the land determined with his death; but the lease does not determine by the death of *A.*, because, though *A.* could transfer the land only during his own life, yet the term having the approbation of *B.*, who has the absolute property, such joining and approbation has made the lessee's interest absolute and indefeasible during the term; and therefore upon the death of *A.* it becomes the demise of *B.*, for *B.* has the sole and absolute interest in the land, and the lessee can hold of none else; and therefore it seems that if *B.* brings an action of waste against the lessee, he may declare of a demise by himself, without taking notice of *A.*, because upon the death of *A.* it becomes the sole lease of *B.*

Lady Whetstone v.
Saintsbury,
2 P. Wms.
147.
Pr. Ch.
591. S. C.

[By marriage settlement lands were conveyed to trustees and their heirs to the use of husband for life, remainder to the use of trustees to preserve contingent remainders, remainder to the use of the wife for life, remainder to the first, &c. son of the marriage in tail male. The husband and wife levied a fine, (they having then a son an infant,) and mortgaged the land to *J. S.* The husband died; *J. S.* brought a bill against the wife and son then of age. The son pleaded the settlement, and insisted that his mother's estate was forfeited, and equity ought not to relieve. The lord chancellor upon argument allowed the plea. But the cause coming on to be heard by the master of the rolls, he observed, that the use and the legal estate were vested in the trustees; and the limitations to the husband, wife, and sons, were but trusts; and a trust for life is not forfeited by a fine (a), and so the plea false, not being warranted by the settlement. He therefore decreed the plaintiff to hold and enjoy during the life of the wife.]

(a) So,
Letheuillier
v. Tracy,
3 Atk. 728.

Evidence.

AS in publick judicatures it is necessary to search into the truth of facts as they really are; hence, whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the testimony of witnesses, in order to enable them to pronounce with certainty concerning the truth of any matter in dispute, whether such matter relates to a person's life, liberty, or property, is called evidence.

As the discovery of truth is of the utmost consequence to the good of society, so it lays men under the strongest obligations, when called upon to give their evidence, to adhere inviolably to truth; and this is a matter, not only enjoined by the precepts of religion, but also by those of reason; the violation of truth being a sin against human society, as it breaks in upon that correspondence that is necessary to social creatures, by destroying the end of language, which is the common tie and band of society; and as raising a different idea in the mind of the hearer from that which is formed in the mind of the speaker, destroys all intercourse between mankind; so it prevents that trust from being reposed in them which is so necessary to their own preservation and the good of others.

From the importance therefore of this matter, the wisdom of our laws has laid down several rules relating to evidence, which we shall consider under the following heads:

(A) Who may be a Witness: And herein,

1. Whether a Husband or Wife may be Witness for or against each other.
2. Whether a Judge or a Juror may be a Witness.
3. Whether a Counsel, Attorney or Solicitor, may be a Witness against his Client.
4. Whether Plaintiffs or Defendants in the Cause may be Witnesses.
5. Whether an Accomplice in a Crime may be a Witness for or against his Companion.
6. How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.

(B) How

- (B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.
- (C) Of the Number of Witnesses required in our Laws.
- (D) Of compelling a Witness to appear and give Evidence.
- (E) Of the Manner of giving Evidence: And herein,
 - 1. Where the Examination is in open Court, and herein of such Questions as may be asked a Witness.
 - 2. Of Examinations and Proofs in Chancery.
- (F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c. in Evidence.
- (G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.
- (H) Of Presumptive Proof.
- (I) Where the Law requires the highest Proof the Nature of the Thing is capable of.
- (K) Of Hearsay Evidence.
- (L) Of the Party's Confession.
- (M) Of Similitude of Hands.
- (N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

What evidence will maintain the plaintiff's action, *vide* under the titles of the several actions; and what the defendant must plead, and cannot give in evidence, *vide* also under the titles of the several actions and head of *Pleadings*.

(A) Who may be a Witness.

Co. Lit. 6.
(a) An infant of the age of nine

ALL persons may be witnesses who appear to have sufficient (a) discretion, and who from their (b) principles must be presumed to have a right sense of the sanctity of an oath (c), and of the

the obligations it lays them under to depose the whole truth, and nothing but the truth; therefore infants, aliens, villeins, bondmen, &c. may be witnesses.

years has been allowed to give evidence.

H. P. C. 263. [An infant under the age of seven years may be a witness in a criminal prosecution, provided such infant appears upon examination to possess a sufficient knowledge of the nature and consequences of an oath: there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense they entertain of the danger and impropriety of falsehood, which is to be collected from their answers to questions propounded to them by the court. But if they are found incompetent to take an oath, their testimony cannot be received. *Rex v. Braiser*, Leach's Cases, 180. *Powell's case*, *Id.* 104. — Mr. J. Rooke, in a criminal prosecution that was coming on to be tried before him at Gloucester, finding that the principal witness was an infant, who was wholly incompetent to take an oath, postponed the trial till the following assizes, and ordered the child to be instructed in the meantime by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the child was produced as a witness, and being found by the court, upon examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony, the prisoner was convicted, and afterwards executed. Mr. J. Rooke mentioned this at the Old Bailey in 1795, in the case of Patrick Murphy, who was indicted for a rape on a child of seven years old; and the learned judge added, that upon a conference with the other judges upon his return from the circuit, they had unanimously approved of what he had done.] (b) But an infidel cannot be a witness, i. e. such a one as neither believes the Old or New Testament to be the word of God, on one of which our laws require the oath should be administered. 2 Keb. 314. 2 Hawk. P. C. c. 46. § 26. [All that the law of England requires is, that the witness should profess a belief in a supreme being, and his moral providence, and appeal to his omniscience for the truth of his attestation. The form of the oath is not of the essence of it. 2 Sid. 6. It is immaterial what may be its external form, provided it affect the conscience of the party. An infidel therefore, that is, one not believing in revealed religion, is, in general, an admissible witness, if sworn according to the ceremonies of his religion. *Onychund v. Barker*, 1 Atk. 21. 1 Wils. 84. But men wholly without religion (and many such, at least *professing* such there are at present) shall not be permitted to bear testimony in any case whatsoever. 1 Atk. 44. Neither shall a person excommunicated be a witness, because being excluded out of the church, he is supposed not to be under the influence of any religion. Bull. N. P. 292. 3 Bl. Comm. 102. — A man deaf and dumb, with whom communication could be held by means of signs, &c. was admitted to give material evidence against a prisoner at the Old Bailey, January Sessions 1786, by Mr. J. Heath, after an argument against his competency. (c) The solemnity of an oath is required from all ranks. Lords of parliament, when they give their testimony, must be sworn. Their privilege to protest upon honour only is confined to their answers in courts as defendants. Sir W. Jones 153-4-5. Cro. Car. 64. 2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146. In the case of the king, his testimony has in one instance been admitted without oath. This was in the reign of James the First, whose certificate under his sign manual, was received as evidence in a Chancery suit without exception. *Abigne v. Clifton*, Hob. 213. But the legality of admitting this evidence, was justly questioned by a great contemporary authority. 2 Roll. Abr. 636. In one case the law dispenseth with the formal manner of being sworn in favour of certain sects of our own people, and allows their affirmation to have the force and effect of an oath. But this indulgence it confines to civil actions. Stat. 7 & 8 W. 3. c. 34. 22 G. 2. c. 30. Perhaps the affirmation of one of these sectaries may be read in defence of a criminal charge against the sectary himself, but not where his evidence is collateral, and in exculpation of a third person, the sectary himself not being charged at all. 2 Burr. 1117.]

[In the second year of *Charles* the first, the House of Lords referred it to the judges generally, whether, in case of treason and felony, the king's testimony is to be admitted: but the king prohibited them from giving their opinion. As to appearing personally, and being sworn in court, that seems wholly inconsistent with the royal dignity.

Lunatics may be witnesses *in lucidis intervallis*.]

But as our law has disabled several persons from being witnesses, who may be supposed so far biased as to be induced to go beyond the truth, I shall consider this matter,

1. In relation to Husband and Wife, and whether they may be Witnesses for or against each other.

Husband and wife are considered as one and the same person in law, and to have the same (a) affections and interest; from whence

7 Parl. Hist. 43.
3 Wooddes. 276.
Com. Dig. tit. Testimoigne, (A. 1).

Co. Lit. 6 b.
2 Roll. Abr. 636. pl. 4.

H.P.C. 263. it has been established as (b) a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.

[2 Term Rep. 265. 262. 4 Term Rep. 678. The husband cannot be a witness for the wife even on a question touching her separate estate. 1 Burr. 472.] (a) But no other degree of kindred or affection, as that of parent to a child, &c., will disable a person from being a witness. Sid. 75. Salk. 289. pl. 28. (b) And holds as well in the courts of equity as in the common law courts. 2 Chan. Ca. 39. 2 Vern. 79.—But where, from the nature and difficulty of the case, the wife's evidence being corroborated by other circumstances, was admitted to be read against the husband, vide Abr. Eq. 226-7.

Hence it hath been adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment on the statute of 1 Jac. 1. c. 11. for a second marriage; but the second husband or wife may be allowed to give evidence, such second marriage being void, and therefore they were never husband and wife.

Raym. 1. State Trials, vol. 4. fol. 754. S. P. admitted in Fielding's trial, and 3 Keb. 490. S. P. admitted in Sir John Savill's case, who was convicted of marrying a second wife. [Broughton v. Harper, 2 Ld. Raym. 752. S. P. 2 Term Rep. 263. S. P.]

But some exceptions have been allowed to this general rule, especially in cases of (c) evident necessity; and therefore it hath been (d) adjudged, and is the constant practice at this day, that on an indictment for a forcible marriage grounded on the 3 H. 7. c. 2. the wife may be a witness against the husband. So, (e) where husband or wife have cause to demand furies of the peace against each other.

(c) Vide Sid. 431. (d) Cro. Car. 438. Fulwood's case. Vent. 243-4. 4 Mod. 8. Stra. 633. (e) 2 Hawk. P. C. c. 46. § 16.

Also, in Lord Audley's case, who held his wife's hands and legs, while his servant, by his command, ravished her, the wife was admitted an evidence.

Hutt. 116. 2 Hawk. P. C. 432. But in Raym. 1. this case is denied to be law; and in Vent. 244. it is doubted of by my Lord Ch. Just. Hale, because here is a wife *de jure*, and to not like the case, where a woman is admitted to prove a forcible marriage.

Also, in (f) Raym. 1. it is said, that a husband and wife may be witnesses against one another in treason; but the contrary is adjudged in (g) 1 Brownl.

(f) Raym. 1. (g) Brownl. 47.; and with this last book, 2 Hawk. P. C. c. 46. § 16. note seems to agree.

[And by stat. 21 J. 1. c. 19. § 6. the wife of a bankrupt may be examined by the commissioners for the discovery of his estate: the contrary whereof was holden to be law before the passing of this act of parliament.]

1 Brownl. 47.

But no other relation is excluded, because no other relation is absolutely the same in interest: therefore in *Pendret* and *Pendrel*, before Lord Raymond, which was an issue out of Chancery to try whether the plaintiff were heir to T. O., the marriage and birth being admitted by order, the mother was admitted to prove the father had access to her. So, in *Lomax* and *Lomax*, before Lord Hardwicke, the mother was admitted to prove the marriage; and in an ejectment against Sarah Brodie at Hereford 1744, Mr. J. Wright

Salk. 289. Str. 925.

Str. 940.

Wright admitted the father to prove the daughter legitimate; her title being as heir to her mother.

In Lord *Valentia's* case in the House of Lords, where the question was, whether the Earl of *Anglesea* was married to the Countess Dowager of *Anglesea*, on 15th September 1741, prior to the birth of Lord *Valentia* their son, who was born in 1744, the countess dowager, having no interest, was admitted to prove the fact of the marriage. So, where the question was, whether the lessor of the plaintiff was the legitimate son of *Francis* and *Mary Stephens*, or was born of *Mary* before their marriage; the court determined, that general declarations by the parents, and the answer of the mother in Chancery, were good evidence, after the death of such parents, to prove that the lessor of the plaintiff was born before marriage. But they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious, more especially the mother, who is the offending party. But the wife may be permitted to prove the fact of adultery with her, though not to prove the baron had no access.

April 22d
1771.

Goodright
v. Mofs,
Cowp. 591.

Rex v.
Rook,
1 Will. 340.
Hardwicke.

Rex v. Reedings, 8 G. 2. per Ld.

A father who was a freeman of a borough by servitude, was admitted to prove the custom whereby his son was entitled to his freedom as eldest son of a freeman.—If a legacy be given to a son, a father may be a witness to prove the will. *Per cur. ibid.*]

1 Will. 332.

2. Whether a Judge or a Juror may be a Witness.

It seems (a) agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the (b) judges who is to try him; and therefore in the case of (c) *Hacker*, two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial.

oery, may himself be examined as a witness at the commission, but then he must be examined first by the other commissioners, after which he may proceed in the execution of the commission. (c) *Kelynge*, 12. Sid. 133. *Style*, 233.

(a) 2 Hawk.
P. C. c. 46.

§ 17.

(b) A commissioner, by virtue of a commission out of Chancery,

Nor is it any exception to a witness, that he is one of the jurors; but then he is, if called upon, to give his evidence on oath openly in court, and not to be examined privately by his companions.

3. Whether a Counsel, Attorney, or Solicitor, may be a Witness against his Client.

It seems agreed, that (d) counsellors, attornies, or solicitors are not obliged (e) to give evidence, or to discover such matters as come to their knowledge in the way of their profession; for by the duty of their offices they are obliged to conceal their clients' secrets; and every thing that they are intrusted with, is (f) *sub sigillo confessoris*: for were it otherwise, no person could ever with safety employ a counsel, &c.

Style, 449.

Keble, 505.

Vent. 197.

(d) That the

same rule

extends to a

servener

who has acted

as counsel

or attorney.

Skin. 404. [And to a person who acts as interpreter between the attorney and client. *Madam du Barre's*

case, 4 Term Rep. 756. (c) In 1 Vez. 63. Lord Chancellor Hardwicke is made to say, "that though an attorney or counsel concerned for one of the parties, may, if he please, demur to his being examined as a witness; yet if he consents, the court will not refuse the reading of his depositions: that the objection had been often made; and though some particular judges had doubted, it was always over-ruled." It should seem from hence as if the right to object were the privilege of the attorney, not of the client; whereas nothing is clearer than that the obligation to silence is for the sake of the latter, not of the former. Bull. N. P. 284. So far from the right to object being in the attorney, the court takes upon itself to stop the witness, whenever it discovers an anxiety in him to reveal the confidential communications of his client. 4 Term Rep. 759. 2 Vez. jun. 189. Nor is it true, that a court of equity will not refuse the reading of the depositions in such case; it will not indeed at once and without examination merely upon this ground, suppress the whole of the deposition; but it will direct a reference to the master, and will expunge such part as he shall find to be matter of that sort, which from the confidence between attorney and client ought not to be disclosed. Sandford v. Remington, 2 Vez. jun. 189.] (f) From the trust and confidence reposed in counselors, &c., it has been established as a rule in the courts of equity, that if an attorney or solicitor, at the time that he is treating for his client about a purchase or mortgage, has notice of a prior title, such notice shall not affect his client, though notice before, or in another transaction shall. 2 Vern. 474. [But it seems now to be settled, that such notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself. Merry v. Abney, 1 Ch. Ca. 38. Brotherton v. Hatt, 2 Vern. 574. Jennings v. Moore, *Id.* 609. 1 Br. P. C. 244. S. C. Le Neve v. Le Neve, 3 Atk. 646. Sheldon v. Cox, Amb. 624. The notice however, must be in the same transaction. The examination of a title by a counsel, or solicitor on a former occasion, shall not be such a constructive notice, as to affect a client in a subsequent transaction. Fitzgerald v. Falconberg, Fitzg. 207. Warrick v. Wanick, 3 Atk. 291. Ashley v. Baillie, 2 Vez. 368. Steed v. Whitaker, Barnard. Ch. Rep. 220.]

Vent. 197. But as the inconveniency would be very great, if a counsel, &c. were not at all to be made use of as a witness; (for by this means every such person's evidence may be taken off by giving him a fee;) so the courts have come to this mean, *viz.* upon every question, to ask him if he knew it of his own knowledge, or from his client, &c. for though the oath is general, to swear the whole truth; yet the intention thereof, and of the law, is only, that he should declare what he knew of his own knowledge, and not reveal what he was intrusted with by his client. [Collateral facts, and acts done by his client in the course of the business in which he has been employed, he is bound to give evidence of: nay, an attorney has been obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury (a).]

Cobden v. It hath been adjudged too, that he was at liberty to give evidence Kendrick, of a conversation between him and his client touching the justice 4 Term of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to be made by way of instruction for conducting the cause. Rep. 431. In this case the communication was made after the suit was at an end, and it was *that* which the judgment of the court turned upon. Had he acquired his information, pending the suit, during the time he acted as attorney, he would not have been permitted to disclose it; for in that case, the obligation to secrecy continues after the determination of the suit, and indeed ceaseth at no period of time. 4 Term Rep. 759.

Wilson v. So, where it appeared that the attorney proposed to be examined, *though confidentially and professionally* consulted with by one of the parties, in parts of the business which constituted the subject-matter of the suit, was yet not actually employed as his attorney in that particular cause, it was adjudged, that he ought to be examined, for that the privilege of a client only extends to the case of the acting attorney for him.

Duchefs of This privilege is confined to the cases of counsel, solicitor, and Kingston's attorney, and does not extend to any other professions.] case, 11 St.

Tr. 243. 4 Term Rep. 758-9.

4. Whether

4. Whether Plaintiffs or Defendants in the Cause may be Witnesses.

In an action of trespass against several persons, one of them, whom the plaintiff designed to make use of as a witness, was by mistake made a defendant; and on motion the court gave him leave to omit him, and have his name struck out of the record, though after issue joined, in order to have the benefit of his testimony.

Sid. 441.
but for this
vide Style,
401. 404.
Savil, 34.
2 Roll.
Abr. 685.
Sid. 237.
Bull. Ni.
Pri. 285.

[And therefore, where in an information for a misdemeanor the attorney general (*Trevor*) offered to examine a defendant for the king, which the court would not permit, he entered a *noli prosequi*, and then examined him.

So, where two were indicted for an assault, and one submitted, and was fined one shilling, the Chief Justice admitted him as a witness for the other.

Rex v.
Fletcher,
1 Str. 633.

If any person be arbitrarily made a defendant to prevent his testimony, it is said, that if nothing be proved against him, he shall be sworn, for he does not swear in his own justification, but in justification of another. But *quere*, whether a verdict should not be first taken for him?

Bull. Ni.
Pri. 285.

If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default: but if he plead, and by that mean admit himself to be tenant in possession, the court will not afterward, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him for as much as he is proved to be in possession of, there seems to be no reason why he should not be a witness for another defendant.

Dormer and
Fortescue,
M. 9 G. 2.
ibid.

In trespass, the defendant pleaded in bar of the action that *R. M.* named in the *simul cum* paid the plaintiff a guinea in satisfaction, and issue was joined thereon: the defendant produced *R. M.* and *per Eyre*, C. J. he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himself liable by swearing he was concerned in the trespass.

Poplet v.
James,
Tr. 5 G. 2.
ibid.

But if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, which must be by producing the original or process against them, and proving an ineffectual endeavour to serve them, or that the process was lost, the defendant shall not have the benefit of their testimony.]

Reason v.
Ewbank,
H. 1 G. 1.
per omnes
just. ibid.

According to the law and practice in the courts of equity, defendants in a cause may be witnesses, for they are forced into the cause; and if their being made parties should absolutely invalidate their testimony, it would be in the power of any one who had a mind to oppress another, to deprive him of his defence, by making the most material witnesses defendants in the suit; and therefore any of the defendants to a suit may be examined as witnesses, saving just exceptions to their credit.

2 Chan.
Ca. 214.
Vern. 230.

But plaintiffs cannot examine each other as witnesses in the cause; because if the cause miscarries, the plaintiffs will be

Vern. 230.
Abr. Eq.
225.

liable to costs, and therefore their swearing is to exempt themselves.

And the practice is, that if a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition for that purpose. This order is of course, and must be served on the adverse party's clerk in court. The defendant too may obtain the like order to examine a co-defendant as a witness for him. But all these orders are upon suggestion, that the defendant is not concerned in point of interest in the matters in question, and they are never granted but with a clause of (saving just exceptions to the other side); and these must be made at the hearing of the cause. The order for examining a defendant must be produced at the commission office, or in the examiner's, when the defendant attends to be examined, for without it he cannot be examined, as it is by virtue of that order, and the authority given them by the court, that they are empowered to examine him, and they cannot do it otherwise.

Ibbotson v.
Rhodes,
1 Eq. Ca.
Abr 229.
2 Vern. 554.

[If there be but one witness against a defendant's answer, the court will direct a trial at law to try the credibility of the witness, and in such case will order the defendant's answer to be read to the jury.]

5. Whether an Accomplice in a Crime may be a Witness for or against his Companion.

As to this, the following particulars are laid down as law by (a) 2 Hawk. Mr. Serjeant (a) *Hawkins*: 1st, That it hath been long settled, P. C. c. 46. § 18. that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders.

[It was at one time doubted,

Also it hath been often ruled, That accomplices, who are indicted, are good witnesses for the king, until they be convicted.

whether the evidence of an accomplice, unconfirmed by any other evidence that can materially affect the case, were sufficient to warrant a conviction? But it is now settled, that an accomplice is a competent witness; and that a conviction, supported by his testimony alone, is perfectly legal. *Atwood's case*, *Leach's Cases*, § 65.]

Also it hath been adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others.

It hath also been adjudged, that where *A.*, *B.*, and *C.* are sued in three several actions on the statute, for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another.

Bull. Ni.
Pri. 286.
Say. Rep.
290.

[It hath been adjudged, that a *particeps criminis* is a good witness for the plaintiff in trespass: though he is left out on purpose to make him a witness, and a recovery against the defendants in the action is a good bar as to him.

Bush v.
Ralling,
Say. Rep.
209., cited

In an information for bribery at an election on the stat. 2 G. 2. the person bribed, and who had taken the bribery-oath, was called

called as a witness. He was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence. But it was holden, that a *particeps criminis* was in many cases a good witness even to obtain a reward or pardon for himself: that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as such transactions are generally matters of secrecy; and *Dennison*, J. cited a case, wherein C. J. Eyre admitted such a witness.

also by Ld. Mansfield, Cowp. 199.

So, where a clerk had embezzled money and notes, the property of his master, which he had laid out with the defendant in illegal insurances in the lottery; on an action brought by the master to recover the money and notes, the clerk was allowed, on receiving a release, to be a good witness, to prove that they had been so disposed of by him.]

Clerk v. Shee, Cowp. 197.

6. How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.

It seems now agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of treason, felony, piracy, *premunire*, or perjury, or of forgery on 5 *Eliz. c. 14.* and also a judgment in attain for giving a false verdict, or in conspiracy at the suit of the king (a), and also judgment for any crime whatsoever to stand in the pillory, or to be whipped or branded (b), being in a court which had a jurisdiction are good causes of exception against a witness, while they continue in force.

2 Hawk. P. C. c. 46. § 17, and several authorities there cited. [(a) A conviction of any crime which amounts to

the *crimen falsi* incapacitates a man from being a witness, therefore conspiracy, barratry, &c. *Priddle's case*, *Leach's Case*, 349. (b) It is now settled, that it is the infamy of the crime which destroys the competency of a witness, and not the nature or mode of the punishment. *Pendock v. Mackender*, 2 Will. 18.]

But no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court (c). Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes whereof he never was convicted.

2 Hawk. P. C. c. 46. § 20. [(c) And it is not sufficient to produce the conviction alone; it must be

followed up by the judgment to consummate the incapacity.

Cowp. 3.]

It is also agreed, that outlawry in a personal action is not a good exception against a witness, as it is against a juror; and that a person convicted of felony, who is admitted to his clergy and burnt in the hand (d), is thereby re-enabled to be a witness.

2 Hawk. P. C. c. 46. § 21. [(d) In the case of the Earl of Warwick,

one French, who had been convicted of manslaughter and allowed his clergy, but not burnt in the hand, was holden by the judges not to be a competent witness; for that though the statute operates as a pardon; yet the words are, that the offender, after the allowance of his clergy and burning in the hand, shall be enlarged out of prison; and therefore both conditions are precedent, and until they are complied with, the party remains convict of felony, and consequently his testimony cannot be received. 3 P. Wms. 456. The stat. 19 Geo. 3. c. 74. § 3, substitutes a discretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand in lieu of the latter punishment; and ordains, that

such fine or whipping shall have the same effect in restoring them to their credit. But felons convicted of petty larceny were never subject to burning in the hand; as they were never in need of praying their clergy. There was therefore this inconsistency: convicts of grand larceny, who had undergone the sentence of the law, were competent witnesses; convicts of petty larceny, who had also undergone the sentence of the law, were incompetent. This is rectified by stat. 31 Geo. 3. c. 35. which provides, that no person shall be an incompetent witness by reason of a conviction for petty larceny. 3 Wooddes. 286. note.]

2 Hawk.

P. C. c. 46.

§ 22.

Also, it it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder, restores the party to his credit. And it was holden by Chief Justice Holt, that the king's pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment, as it is in conspiracy at the suit of the king, and in perjury on the statute.

2 Hawk.

P. C. c. 46.

§ 23.

It hath been ruled that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment.

(B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.

Co. Lit. 6.

Sid. 237.

(a) And this rule has been so strictly adhered to, that it is

IT has been always (a) held a sacred and inviolable rule of evidence in all cases (b) whatsoever, not to admit the testimony of a witness, who is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only.

said, that though a witness is examined an hour together; yet, if in any part of his evidence it appears that he was a party interested, the court will direct the jury, that he is no witness, nor his evidence to be regarded. 2 Vern. 463. [The incompetency of a witness by reason of his being interested, may be ascertained, either by examining the witness himself on a *voir dire*, or bringing other proof, whether he is interested in the event of the suit; but a party, it is said, cannot have recourse to both these methods: 10 Mod. 151. Amb. 593. Ca. temp. Hardw. 358. It was formerly the rule to disallow objections to the competency of a witness, as too late, after he was sworn in chief: and though this rule is in some measure relaxed; still the objections must be taken at the trial. 1 Term Rep. 719-20. 4 Burr. 2256. (b) Hence, he who is bail for another cannot be a witness for him, for he is directly and immediately interested; for if a verdict be given against the principal, he becomes immediately liable. 2 Hawk. P. C. c. 46. § 24. 1 Term Rep. 164. So, a *prochein ami*, by whom an infant sues, cannot be a witness, because liable to the costs. Hopkins v. Neal, 2 Str. 1026. Clutterbuck v. Lord Huntingtower, 1 Str. 506.]

From this general rule several doubts and difficulties have arisen with regard to those cases where the party may be said to have an interest, and from the extreme difficulty attending certain particular cases, this matter seems in several instances to be very unsettled, and any information upon it can only be collected from the nature and circumstances of the cases themselves.

Salk. 283.

Pl. 13.

Ld. Raym.

724. Ruled

by Treby.

Ch. J.

[For the

It has been held, that an heir apparent may be a witness concerning the title of the land, for the heirship of the heir is a mere contingency; but if there be a tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of those lands; for he hath an estate, such as it is.

bare possibility of an interest in the witness will not exclude his testimony. Hence, a liability to be rated to the poor is no objection to a witness in questions touching an existing rate, or the settlement of a pauper. Rex v. Prosser, 4 Term Rep. 17. Rex v. South Lynn, 5 Term Rep. 664. So, a co-obligor in a bond

bond to the ordinary, under 22 & 23 Car. 2. c. 10. may be admitted to prove a tender by the administratrix. *Carter v. Pearce*, 1 Term Rep. 163. So, a creditor of the administratrix is admissible for the same purpose. *Ibid.*]

It seems to be agreed, that one commoner (*a*) cannot be a witness to prove the right of common in an action brought by another; for the right being entire, his swearing tends to entitle himself.

Skin. 174.
pl. 4.
[(*a*) If the
issue be on
a right of
common,

which depends on a custom pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right. But the same reason does not hold where common is claimed by prescription in right of a particular estate; for it does not follow, that if *A.* has a prescriptive right of common belonging to his estate, that *B.* who has another estate in the same manor must have the same right; neither would the judgment for *A.* be evidence for *B.* *Per* Buller, J. 1 Term Rep. 302-3. So, by Lord Holt, in *Ld. Raym.* 731. If *A.*, *B.*, *C.*, *D.*, and *E.* claim common exclusively of all others, and *A.*'s right be disputed, *B.* may be a witness for him, for it tends to narrow his own right. But if there be a custom that all the inhabitants of Blackacre ought to have common there, one of the inhabitants in that case cannot be a witness.]

[So, where the question respected the rights of lords of customary manors, the lords of other manors were deemed incompetent witnesses, because the question concerned a general right.

Duke of
Somerset
v.
France,
1 Str. 658.

A tenant in possession is not an admissible witness to prove the estate of his landlord, for this would be to uphold his own possession. So (*b*), where a motion was made to admit the landlord a defendant in ejectment, instead of the tenant, upon an affidavit that the tenant was a material witness, the court refused it, because the tenant was liable to answer for the mesne profits, and therefore could not be a competent witness.

Doe v.
Williams,
Cowp. 621.
(*b*) Bourne
v. Turner,
1 Str. 632.

If two persons are contending for the possession, who are to pay rent in different rights, the landlord cannot, in that case, be admitted as a witness to prove the demise in the ejectment. But where the question is merely touching the settlement of the tenant, the landlord may be received to explain the terms of his demise. So, where in action of covenant for rent upon a lease by *A.* to *B.*, the point in issue was, whether *C.* (whose title both admitted) demised first to *A.* or to another person, *C.* was allowed to be a competent witness to prove that point.

Bell v.
Harwood,
3 Term
Rep. 308.
Rex v.
Woodlands,
1 Term
Rep. 262.

It hath been usual in actions on policies of insurance, not to admit underwriters on the same policy to be witnesses for each other. But this is now treated rather as an objection to the credit, than the competency of the witnesses.]

(*c*) Bent v. Baker, 3 Term Rep. 27.

So, where the master of a ship brought an action against the custom house officers, for refusing to clear his ship and re-deliver his caskets; it was held, that the owners of the goods on board could not be admitted as witnesses to prove him master, &c. for that they were all concerned in (*d*) one bottom, and in one adventure.

Ridout v.
Johnson,
Bull. Ni.
Pri. 283.
Skin. 174.
pl. 4.
Sands v.
the Custom-
house Offi-
cers.
(*d*) But one
mariner may

be admitted as a witness to prove wages due to another, for there the contracts are several. Skin. 174.
pl. 4. seems to be admitted. And this is certainly law, and every day's practice.

In an action against the master of a ship for so negligently managing the ship, that it ran over the plaintiff's barge; it was held,

Salk. 287.
pl. 22. ruled
by Holt,

Ch. Just. held, that the pilot could not be a witness, because he was answer-
 Ld. Raym. able, if faulty in steering, to the matter (a).
 1007.

(a) But he might have been released by the master and owner, and made a good witness. — On an action brought against a master, for a carman's driving his cart negligently, *per quod*, &c. the carman was admitted witness for his master on showing a release from him. *Jarvis v. Hayes*, Str. 1083. [But without a release, the testimony of the servant in such case is not admissible. *Green v. The New River Company*, 4 Term. Rep. 559.]

Skin. 403.
 pl. 38.
 [But there
 are many
 cases where
 servants and
 sailors,
 though
 parties in-
 terested,

The master of a ship took a prize, and disposed of 100 chests of lemons to A., for which he brought his action, and a mariner was allowed to be sworn as a witness, though it appeared, that by the Admiralty law he was to have a share of the prize; for the master is accountable to the mariners for their share, which they shall recover from him, whether he recovers in this action or not.

will be admitted *ex necessitate*. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 Geo. 2. inflicts a penalty upon them for not doing it; though Eyre, C. J. did on that account, in two or three instances, refuse to receive them. *Per Lee, C. J.* in *E. I. Company v. Gosling*, Bull. N. P. 230. So, where the question was, whether the master had deserted the ship without sufficient necessity? a sailor, who had given a bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds. *Ibid.* So, if a man pays money by his servant, the servant may be a witness from the necessity of the thing. *Tybbald v. Tregott*, 4 Mod. 26. So, where a son, having a general authority to receive money for his father, received a sum, and gave it to the defendant; the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money. 1 Saik. 289. So, in trover against a pawn-broker, the servant embezzling his master's goods and pawning them, will be admitted to prove the fact. *Mich. 1752. C. B. at Westminster*, Bull. N. P. 290. So, in an action to recover money from a lottery-office keeper which the plaintiff's clerk had embezzled, and paid to the defendant upon the chances of the coming up of tickets in the state-lottery, contrary to the lottery act, the clerk was admitted as a witness to that fact. *Clark v. Shee*, Cowp. 197. In this case indeed the clerk had a release from the plaintiff and his sureties: but *quæ* if he would not have been admissible without a release? So, in actions by masters for assaulting a servant, *per quod servitium*, &c., it is every day's practice to admit the servant as a witness for the master. *Duel v. Hardam*, 1 Str. 595. *Lewis v. Fog*, 2 Str. 924. *Cock v. Wartham*, *Id.* 1054. *Tullidge v. Wade*, 3 Will. 18. *cont.* *Dausley v. Westbourne*, 1 Str. 414. — So, for the sake of trade and the common usage of business, an interested servant will be admitted. As, a porter is evidence to prove a delivery of goods: a banker's apprentice to prove the receipt of money. Bull. N. P. 289. So, a factor, who made the agreement between the parties, was allowed to be a witness to prove the contract, though he was to have a shilling in the pound; for, as factor he was concerned both for vendor and vendee, was a mere *go-between*, and might be a witness for either. *Dixon v. Cooper*, 3 Will. 407.]

Hard. 331. It seems agreed clearly, that a legatee in a will cannot be a wit-
 2 Saik. 691. nefs to (b) prove the (c) will, because he is (d) presumed to be par-
 pl. 5. tial in swearing for his own (e) interest.
 (b) But he

may be a witness against the will, for when he swears against the will, he swears against his own interest, and is therefore the strongest witness. 2 Saik. 691. pl. 5. — So, freemen of a corporation were allowed witnesses against the corporation. 2 Show. 146. pl. 127. (c) Yet he may be examined as a witness to prove a deed or other thing which has no relation to the will. *Style*, 370. — So, if the parson sues one of his parishioners for tithes, who pleads a *modus*, the other parishioners, though they cannot be witnesses as to the custom, yet they may be witnesses as to the value of the tithes. (d) But if the legacy be inconsiderable, as that he cannot be presumed to be biased by it; as if it be 5 s. to a private person, or 5 l. to a nobleman, it is said that he may be a witness for the will. *Vern.* 254. But it is settled, that the minuteness of the interest is no answer to the objection, and that therefore where the party is concerned in interest, though never so small, he cannot be a witness, 2 Vern. 317. 4 Burn's E. l. 95. *Vent.* 351. (e) Where a witness hath a legacy by the will, by a release of the legacy, though at the trial, he becomes disinterested, and so is a good witness. *Sid.* 315. [See tit. "Wills and Testaments" (D), and 25 Geo. 3. c. 6.] — So, a bankrupt, who has assigned and released all his estate and right to the assignees, may be examined as a witness for them. 2 Vern. 637. — [But in a *qui tam* action on the statute of usury, against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or re-paid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from this debt in particular, and all claim to allowance and

and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters v. Drayton*, 2 Term Rep. 496.]

So, if *J. S.* devises lands to *A.* and the will is signed, sealed, and published in the presence of the said *A.* and *B.* and *C.* who attested the same; yet this is no good will to pass *those* lands; for the statute of frauds requires three or more competent witnesses, which *A.* cannot be, being concerned in interest as devisee of the lands, and therefore not a credible witness. Carth. 514. Hiliard and Jennings, vide tit. Wills. Ld. Raym. 507.

It is said by *Hale*, Ch. Just. that he knew it to have been adjudged, that an executor in a cause (*a*) concerning the testator's estate, if he hath not the surplusage given to him by the will, may be a witness for the will. Mod. 107. [An executor in trust is a good witness for the will.

And though in the case of a trustee, it hath been usual to have a release, yet that is not necessary, for such person has in fact no interest to release. Nor is it any objection to an executor's testimony, that he may be liable to actions as executor *d. son tort.* *Lowe v. Jelliffe*, 1 Bl. Rep. 365. *Holt v. Tyrrell*, 1 Barnard. 12. *Goodtitle v. Westford*, Dougl. 159. *Esdaile v. Wilson*, 4 Burr. 2254. In *Goff v. Tracy*, Canc. M. 1715, Lord Cowper determined, that a grantee, where he appears to be a bare trustee, is a good evidence to prove the execution of the deed to himself. 1 P. Wms. 287.] (*a*) That the children of an intestate cannot, by reason of their interest, under the statute or distributions, be witnesses in any thing relating to the intestate's estate. *Skin.* 223.

[An informer under a penal statute, who is entitled to part of the penalty, cannot be admitted a witness against the offender. *Rex v. Stone*, 2 Ld. Raym. 1545. *Rex v. Piercy*, Anor. 18. *Rex v. Blunz*, *Id.* 240. *Rex v. Tilly*, 1 Str. 316.—But some modern statutes declare the informer to be a competent witness; as the act of 32 Geo. 3. c. 56. § 7. for preventing the counterfeiting of certificates of the characters of servants.

The plaintiff had been appointed husband of a ship by a deed executed by all the joint owners; by which deed he was empowered generally to lend or advance money, &c. He insured for all the owners; and brought separate actions of covenant against two of them: they were each of them charged for the amount of the whole sum paid. It was agreed, that a direction to insure given by one part-owner did not bind the rest, without an express or implied authority for that purpose from the rest. The plaintiff did not pretend that any express general direction to insure had been given by all the owners; but insisted that they were all informed of it, and acquiesced in it, and called a witness to prove it. This the defendant denied, and offered to disprove it by calling the defendant in the other cause, insisting, that he was a competent witness, because he was not interested in the event of that suit, for that each of the two causes was to stand on its own evidence. But Lord *Mansfield*, at the trial, and afterwards, the court of *K. B.* rejected this witness as incompetent; for unless there was a general direction to insure, the plaintiff could not recover in this action; and a verdict against one of these joint-owners would affect the other of them; because that other would be obliged to contribute (*b*). French v. Backhouse, 5 Burr. 2727. (*b*) According to this statement, the court considered the witness as interested in the event of the cause; though *Buller J.* in the case of *Walton v. Shelley*, 1 Term Rep. 303. treats the decision as having proceeded upon the ground merely of an interest in the question. His words

are, "In that case, the second defendant was certainly not interested to support the defence in the first cause; for if the plaintiff had recovered in that, the second defendant, who was offered as the witness, could not have been charged with any part of the damages recovered in the first action."

A. gave

Tre'lawney
v. Thomas,
1 H. Bl.
303.

A. gave a general bond to *B.* for the payment of a sum of money. It appeared upon examining *A.* on a *voir dire*, that it was understood between them, that this money was to be applied towards indemnifying *B.* from the expences of an election in which *B.* was a candidate. In an action brought by *C.* against *D.*, an active member of a committee for carrying on *B.*'s election, for money advanced and services performed in supporting the interest of *B.* at the request of *D.*, it was holden that *A.* was not a competent witness; for he was interested in the event of the cause, inasmuch as by procuring the plaintiff to be nonsuited or a verdict against him, he would save himself from the consequences of this action, since, if he succeeded, as the defendant would call upon *B.* to be reimbursed the damages and costs, *A.* would be liable by his engagements to *B.*; and if the plaintiff, having failed in this action, should bring another against *B.*, *A.* might tender to *B.* the amount of the plaintiff's demand, and thereby escape the costs, for if *B.* should proceed against him on the security, he would be restrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.]

Co. Lit.

6. b.
2 Roll.
Abr. 685.
Raym. 191.
2 Hawk.
P. C. c. 46.
§ 24.

He who borrows money upon an usurious contract, cannot be a witness upon an information for the usury (unless he hath paid the money) (*a*), whether such information be brought by himself or any other; for if in such case a man might be a witness, he would in effect swear for himself, by proving a matter which may avoid his own contract.

[Shank *q. t. v.* Payne, 1 Str. 633. S. P. (*a*) In which case he is a competent witness, though the fact of payment should be proved by no other person but himself. *Abraham v. Eunn*, 4 Burr. 2251.]

Rex v.
Whiting,
Salk. 283.
pl. 12.
Ld. Raym.
376. Rex
v. Nunez,
2 Str. 1043.
S. P. but
vide Rex v.

Hence also it hath been held, that he, who by a slight has been imposed upon to set his hand to a note for more money than he intended, is no good witness on an information for the cheat; because a conviction may be a means to avoid the note, by being made use of by the party when sued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence.

Ellis, Id. 1104. S. P. *Rex v. Parris*, Sid. 431. Vent. 49. 2 Keb. 572. [*Rex v. Broughton*, 2 Str. 1229. *contr.* In the case of the *King v. Bray*, Ca. temp. Hardw. 359. Lord Hardwicke said; that if the case of the *King* and *Whiting* were examined into, it would be found to be rather an objection to the credit than the competency.]

Salk. 283.
pl. 12.
Ld. Raym.
376.

Also, it seems generally agreed, that he, whose property may be prejudiced by a (*b*) forgery, is no evidence to prove it on an indictment or information.

[Shank *q. t. v.* Payne, 1 Str. 633. S. P. *Rex v. Rhodes*, 2 Str. 728. S. P. Though a person, as it is said, whose hand is forged, is not admissible to prove the forgery, yet under many circumstances, he may be admitted, where he is not directly interested in the question; as in *Wells'* case, who was indicted for forging a receipt from a mercer at Oxford, the mercer having before recovered the money in an action against *Wells*, was admitted by *Willes, C. J.* to prove the forgery. Bull. Ni. Pri. 289. So, where *Newland* forged a bank-note in the name of *William Lander* one of the cashiers; *Lander* was admitted, *without a release*, to prove that it was not his signature; because the interest and liability to pay must be immediate and apparent either upon the face of the instrument forged, or on a *voir dire*; and *Lander*, the cashier, was only *mediately* liable over to the bank upon his security. O. B. 1784.—A bond was forged by *Dr. Dodd* in the name of *Lord Chesterfield*, and the obligees executed a release; upon which his

his lordship was admitted to prove, that the signature was not his hand-writing. Leach's Hawk. 2 vol. c. 46. § 24. note. But on an indictment for forging a seaman's will, a person named executor in a will of a subsequent date, was holden an incompetent witness to prove that the name of the testator to the first will was a forgery; for that went to establish the second will in which he was named executor. Rhodes' case, Leach's Cr. Caf. 23.] (b) And if it be a forgery within 5 Eliz. c. 14. a farther reason is given in 2 Hawk. P. C. c. 46. § 24. why such person cannot be an evidence, because he may have an action on the statute.

So upon this reason it hath been adjudged, that he, against whom a verdict is given, cannot be a witness to prove perjury in the evidence.

taken for granted. Sid. 257. Keb. 836. Rex v. Whiting, Salk. 283. pl. 12. S. P. [Rex v. Nunez, 2 Str. 1043. S. P. But see Rex v. Broughton, 2 Str. 1229. *contr.* However, in the case of Rex v. Eden, Lord Kenyon held, that the defendant in the original action, against whom the verdict went, was an incompetent witness, he not having paid the debt and costs. Hil. 34 G. 3. Espinasse's Ca. at Nil. Pr. 97.]

Yet notwithstanding these cases, and the force of these reasons, there are several instances, where, in cases of (a) necessity, a person, whose (b) damage an indictment or information concludes to, has been allowed and admitted an evidence, and his credit left to the jury.

6 Mod. 301. 311. 7 Mod. 110. (a) On the statute of robberies, a man swears himself, because there can be no other witness. 3 Mod. 114, 115. *per cur.* (b) As in an indictment for a battery, &c. 2 Hawk. P. C. c. 46. § 24.—Where a person rescued was admitted a witness for the person against whom an action was brought for the rescue, and his credit left with the jury. 6 Mod. 211.

If the warden of the *Fleet* suffers a voluntary escape, and an inquisition, by virtue of a special commission issuing out of Chancery, is taken thereof, which he traverses; the person escaping, though he gave a bond to be a true prisoner, is a good witness to prove the escape; for this does not make the bond void, as a conviction on the statute of usury does; besides, this is a matter privately transacted between the party and officer, of which there can be no other evidence.

Upon this rule, that an interested person cannot be a competent witness, it has been often doubted, how far (c) freemen of a corporation, the inhabitants of a hundred or parish, should be admitted as witnesses in matters which concern those places; and here it is (d) said, that no general rule can be laid down, but that every case must stand upon its own particular (e) circumstances, viz. Whether the interest be of that nature, or so considerable as by presumption to produce partiality in the witnesses.

2 Lev. 231. (c) Where the party released all his right to the corporation, and this made them good witnesses. 2 Jon. 116. 2 Lev. 235.—* The usual way is to disfranchise those, a corporation calls as witnesses.*

Hence in an information in nature of a *quo warranto*, for taking *1 d. per* children for all sea-coals brought to *London*, where the defendants prescribed for the duty, upon which issue was taken and tried at the bar, it was held, that the freemen of *London* were good witnesses to prove the prescription, though the mayor, &c. have the whole profit of this toll, which is for the benefit of the corporation, of which all the citizens and freemen are members; for it cannot be presumed, that for an advantage so small and so remote, they would be partial and perjure themselves (f).

he is disabled from being a witness. Hence, where a corporation, being lord of a manor, being lord of a manor, had approved

2 Roll. Abr. 685. and the same point is

Sid. 211. 237. 2 Keb. 384. Salk. 286. pl. 20. 2 Ld. Raym. 1179.

2 Salk. 690. pl. 3. The King and Ford. [See Fitzg. 80. The King against Huggins, S. P. ruled on the authority of this case.]

(c) Where there has been a dispute between two counties, vide Sid. 192. (d) By Scroggs, Chief Just.

2 Lev. 281. The King v. the Mayor of London. [(f) The quantum of interest will not affect the case at all: if the party have any interest, had approved

part of a common, and leased it, reserving rent to the corporation, a freeman was not admitted to prove, that there was a sufficiency of common left for the commoners. *Burton v. Hinde*, 5 Term Rep. 174.]

Vent. 351. So, in the case of the city of *London*, concerning the duty of water-bailage, where the mayor and commonalty brought an *indebitatus assumpsit* against *A. B.* for 5 *l.* for so much due to them for divers tons of wine brought from beyond the seas to the port of *London*, at 4*d.* per ton; and some freemen being produced as witnesses, it was objected, that the commonalty of *London* comprehending all the freemen, this made them interested in the success of the cause; but it was held by three judges against one, that so small and remote an interest did not disable them from being competent witnesses. However, they were laid aside by consent. evidence was rejected, and so said to be resolved, 2 Vern. 317. [4 Burn's E.L. 95.]

The Company of Carpenters, &c. v. Hayward, Dougl. 374. [A person, who has acted in breach of an alleged custom, is not a competent witness to disprove the existence of the custom; for if the custom should not be established, he would be discharged from any actions he may be liable to for the breach of it.]

7 Mod. 63. At a trial at bar concerning boundaries of lands; the parson of the one parish, the land lying in two parishes, was rejected, because he might enlarge his own parish, and by consequence the tithes; but one, who about seven years before had taken the profits, under the title of one of the parties, was received as a witness, because now he might plead the statute of limitations.

2 Sid. 109. It is said in 2 *Sid.* to have been ruled on evidence at a trial at bar, that if a remainder after an estate for life be limited to the minister and churchwardens of a certain parish, for the use and benefit of the poor of the parish, (a) that any of the parishioners may be witnesses to prove this devise. (a) But in 2 Vern. 317. where the question related to the loss and misapplication of a sum of money given for the benefit of the parishioners, it was held, that an inhabitant of the parish could not be a witness; and that the cases where the party was concerned in interest, though never so small, have always prevailed.

Vent. 351. In an action against the hundred, upon the statute of *Winton*, admitted. an hundredor (b) cannot be a witness.

(b) **Mod. 73.** S. P. though he be poor, and pays no taxes, or parish duties; for when the money recovered of the hundred comes to be levied, he may then be worth something; but servants, and those who receive alms, may be witnesses. 2 Keb. 73. S. P. [But now by stat. 3 Geo. 2. c. 16. § 15. inhabitants of hundreds are made competent witnesses at trials on the statutes of hue and cry.]

Vent. 351. On an indictment against the county for not repairing (c) a bridge, it has been doubted whether an inhabitant of the county could be a witness. (c) If there be a dispute between two parishes, which of them shall repair a certain highway, the inhabitants of neither of the parishes can be witnesses. 4 Mod. 43, 49.

But now by the 1 *Ann. ft. 1. c. 18.* reciting, That whereas many private persons, or bodies politick or corporate, are of right obliged to repair decayed bridges, and the highways thereunto adjoining; but because the inhabitants of the county, riding, or division, in which such decayed bridge or highways lie, have not been allowed, upon informations or indictments brought against such person or persons,

persons, bodies politic or corporate, for not repairing such decayed bridges and the highways thereunto adjoining, by the judges before whom such information or indictment is to be tried, to be legal witnesses; it is enacted, "That in all informations or indictments to be brought and tried in any of her Majesty's courts of record at *Westminster*, or at the assizes or quarter-sessions of the peace, the evidence of the inhabitants, being credible persons, or any of them of the town, corporation, county, riding or division, in which such decayed bridges or highway lie, shall be taken and admitted in all such cases in the courts aforesaid."

And by the 3 & 4 W. 3. c. 11. "In all actions to be brought in the courts of *Westminster*, or at the assizes, for money mispent by church-wardens, the evidence of the parishioners, other than such as receive alms, shall be taken and admitted."

On this rule, that an interested person cannot be a witness, the time and manner of a witness's becoming interested seems also material; and therefore it has been held, that it is no good exception against a witness, that he hath a promise of a reward, on condition of giving his evidence, especially if such reward be not promised by the person for whose benefit he is to swear, and by way of contract for giving such and such particular evidence. Also it has been held, that a witness's laying a wager about the success of the cause is no objection against his being sworn as a witness, for the party hath an interest in his testimony, which to deprive him of by his own act would be unreasonable.

Hence it hath been held, that on a *scire facias* against the king's patentee, a person, who has a promise of being made a deputy,

may be a witness.
by three judges against Twiften, who held, that it was like a man's promising another, that, if he recovered the lands, he should have a lease of them, which, he said, disabled him from being a witness.

Skin. 586.
Pl. 5.

Mod. 21.
2 Keb. 576.
So ruled at
a trial at bar
3 Lev. 152,
153. Rel-
cous and
Williams,
adjudg'd,
and Jones,
Ch. Just.

But it has been held, that if several persons lay wagers at a horse-race, &c. and an action is brought against one of them for the money lost, that a better on the same side cannot be a witness for him who lost; but if such person acknowledges that he lost the wager, and pays the money, he may be a witness.

held, that laying a wager, or being a better, did not destroy the testimony of the witness, but went only to his credit.—[See Baron v. Bury, Vin. Abr. tit. Evidence (1), pl. 33. S. P. and same distinctions as in the text. In Str. 652. Rex v. Fox, on an indictment for an assault, it was proved, that the prosecutor had laid a wager that he should convict the defendant: And Lord C. J. Raymond held him to be a good witness for the king, though it might go to his credit. And the better opinion seems to be, that it is no objection to the competency of a witness, that he has laid a wager on the subject of the suit, though it may affect his credit. Cowp. 7:6. 3 Term Rep. 37. And it seems now to be a settled rule, that where a person makes himself a party in interest after a plaintiff or defendant has acquired an interest in his testimony, he shall not by this deprive the plaintiff or defendant of the benefit of his testimony. Therefore, a broker who underwrites a policy after getting it underwritten by others, is a competent witness for the defendant in an action against any of those who underwrote before him. Bent v. Baker, 3 Term Rep. 27.]

It has been held in Chancery, that if a person is examined as a witness, who is no ways concerned in interest, and afterwards he becomes heir at law, and thereby interested in the matter, that
notwith-

2 Vern. 639.
[1 P. Wms.
287. S. C.]
Abr. Eq. 224.

[2 Atk. 615. 2 Vez. 42. Tully's case, 2 Ld. Raym. 1008. notwithstanding, his depositions, when thus disinterested, may be read, even (a) at a trial at law; and that it was like the case, where the only surviving witness to a deed becomes the party interested (b), or where a witness to a deed becomes blind, in which cases his hand may be proved at law.

1 Salk. 286. *Holcroft v. Smith*, 1 Eq. Ca. Abr. 224. *Baker v. Lord Fairfax*, 1 Str. 1001. *contr.* But depositions have been allowed to be read at law, where the witness was beyond the reach of judicial process. *Lord Altham v. Lord Anglesey*, Gilb. Ca. in Eq. 16. 11 Mod. 210. S. C. So, where he could not be found, or was disabled from attending by sickness. *Fry v. Wood*, 1 Atk. 449. Bull. Ni. Pri. 239.] (a) But at a trial at bar in C. B. on an issue directed out of Chancery, the judges refused to have such depositions read, because the witness was still living. *Albr. Eq. 224.* But in 2 Vern. 699. such depositions were read in Chancery, and there said, that the reason of rejecting such evidence at law was, because it was against the rule, viz. that where the witness is living, and might be produced at the trial, the deposition of such witness cannot be read. [(b) As, where he becomes executor or administrator to the obligee of a bond. *Godfrey v. Norris*, 1 Str. 34. *Goss v. Tracy*, 1 P. Wms. 280. So, where he becomes infamous. *Jones v. Mason*, 2 Str. 833. But if the subscribing witness be interested both at the attestation and at the trial, he can neither be examined as a witness to prove the execution, nor can his hand-writing be proved. *Swire v. Bell*, 5 Term Rep. 371.]

2 Vern. 472. *Callow and Mine.* A witness was examined whilst she was interested, before the hearing; and the cause being heard and decreed to an account, she was re-examined after the hearing, before the master, on the account, having first released her interest: it was objected, that she ought not to be heard, for having been examined whilst interested, and her depositions published, she was thereby engaged, and almost under a necessity of standing to what she had before sworn, and could not be free to retract or contradict it; but the lord keeper over-ruled the objection.

2 Hawk. P. C. c. 46. § 25. [(c) But Sir Matthew Hale is of a different opinion. 2 Hal. H. P. C. 280.] It is no good exception against a witness, that he has a maintenance from the king or other person, for every one may maintain his own witnesses; nor is it any exception against a witness, that he has received a reward for having made a discovery of the crime to be proved against the prisoner, nor that he hath the promise of a pardon on condition of giving his evidence (c).

Fotheringham v. Greenwood, 1 Str. 129. But *quod* whether the being under mere honorary engagements ought not to go rather to the credit, than the competency of a witness, since it is impossible to render the witness competent, a notional honorary interest not being the subject of a release.

Walton v. Shelly, 1 Term Rep. 300. A person shall not be permitted to give evidence to invalidate a negotiable instrument which he has signed.

But this rule is confined to negotiable instruments; for in the case of Mr. Jolliffe's will, all the subscribing witnesses were allowed to give evidence of the insanity of the testator at the time of making it. *Love v. Jolliffe*, 1 Bl. Rep. 365.

Goodtitle v. Welford, Dougl. 139. If a person who is tendered as a witness does every thing in his power to get rid of the objection to his testimony, it shall not be competent to the other party by an obstinate refusal to prevent him from being examined.]

(C) Of the Number of Witnesses required in our Laws.

IT is holden by my Lord Chief Justice *Holt*, that at common law it was not necessary in any case, that a proof of matter of fact should be made by more than one witness, and that the single testimony of one credible witness was sufficient to prove any fact, and that the authorities cited by my Lord (a) *Coke* do not warrant the opinion founded on them.

as of the challenge of a juror, or summons of a tenant, the affirmative ought to be proved by two or more witnesses; but when the trial is by verdict, there, the judgment is not given upon witnesses, or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury they give their verdict.

But the civil law requires two witnesses to prove a fact; and therefore it has been holden, that if the spiritual court, which proceeds according to the civil and canon law, refuse, where a temporal matter is pleaded in bar of an ecclesiastical demand, to admit the evidence of one witness, they shall be prohibited; as where an executor proves payment of a legacy by one witness, &c.

Vent. 291. *Carth.* 142. 2 *Salk.* 547. pl. 1.

Hence it hath been established as a fundamental rule in the courts of equity, that a decree cannot be made on the testimony of one single witness against the flat and positive denial of a fact by the defendant's answer; (b) because the oath of the party is ever looked upon, in equity, to be as good as the oath of a single person.

a bill is exhibited against them to discover a trust, and they, in their answers, disagree in the matter, the wife confessing what the husband denies, and what the plaintiff can prove only by one witness, the plaintiff can have no relief; for one witness is not sufficient against the husband's answer; and the wife's confession will not avail, for she can be no witness against her husband. 2 *Chan. Ca.* 39. 3 *P. Wms.* 238.

Yet cases may, and do often fall out, that the court may ground a decree upon the oath of a single witness, attended with other circumstances to corroborate it; as where the answer of the party appears to be notoriously falsified, by which means it comes to lose that credit which otherwise it would and ought justly to have.

Also, by several acts of parliament, a certain number of witnesses is required, as by the 29 *Car.* 2. c. 3. "That all devises of lands shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void."

By the 7 *W.* 3. it is enacted, "That no person shall be indicted, tried or attainted for high treason, but upon the oaths of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the (c) same treason."

act of the same species of treason, or at least one witness to an overt act, and another to a material circumstance to prove it. 2 *Hawk. P. C.* c. 26. § 2. But for this *vide* tit. Treason.

Carth. 144. (a) *Co. Lit.* 6. a. where my Lord *Coke* says, that when a trial is by witnesses,

Show. 158. 3 *Mod.* 172. 283. *Comb.* 160. *Holt.* 752. pl. 1. *Ld. Raym.* 220. *Vern.* 161. 3 *Chan. Ca.* 123. (b) If an executrix to a first husband marries a second, and

the matter, one witness, the 2 *Chan. Ca.* 39. *Vide* 2 *Vern.* 554. *Abr. Eq.* 229. 2 *Atk.* 19. 3 *Atk.* 419. 1 *Br. Ch.* *Ca.* 52.

But for this *vide* head of Wills.

(c) There must be one witness to one, and another witness to another overt

(D) Of compelling a Witness to appear and give Evidence.

21 H. 6.

6. a.

21 H. 6.

4. b.

Bro. Main-

tenance. 5.

51. 2 Roll.

Abr. 118.

[(a) This

is now not law. See 4 Term Rep. 340.]

(b) And

to-refore

witnesses are

privileged

etiamsi &

recedendo,

for which

writ tit.

Privilege.

(c) A feme

covert is

within the

statute, and

if she be

served with

a *subpoena*,

and refuse

to appear,

the action

lies against

the husband

and wife.

Cro. Eliz.

122.

Havthlome

and Harvey,

adjudged.

Jon. 430.

S. C. and

S. P. ad-

judged.

(d) A delivery of a ticket containing the substance of the writ, is a sufficient service within the act.

5 Mod. 355. Cro. Car. 340. S. P. for there being two, three, or four names of witnesses in one

writ, he cannot leave the writ with every one of them; and to have several writs for every witness would

be very chargeable to the subject. [Four witnesses only can be put in one writ of *subpoena*. Cowp. 246.

and a ticket should be made out for each witness, and personally delivered to him, a reasonable time be-

fore the day of trial, 2 Str. 1054.; for witnesses ought to have a convenient time to put their own

affairs in such order, as that their attendance on the court may be of as little prejudice to themselves as

possible. 1 Str. 510.]—(e) If a feme covert be the person to appear as a witness, the tender must be

to her, and not to her husband. Cro. Eliz. 122. Jon. 430. S. P. (f) If the party gives the witness

a shilling, which he accepts, and promises, that on his appearance he will pay him all further reasonable

charges; this is sufficient. Cro. Car. 522. 540. March, 18. (g) In Cro. Eliz. 130. and the S. C.

Leon. 122. it is adjudged, that the plaintiff need not set forth any special damage which he sus-

tained by the negligence of the defendant in not appearing to give evidence, where the action is brought

for tort only, and not for any more damages; but the contrary has since been resolved in Cro. Car.

512. 500. Goodwin and West, Jon. 430. and 5 Mod. 355. Maddison and Shore, which was affirmed

on a writ of error; for there must be a party grieved, otherwise there is no cause of forfeiture, and a par-

ticular damage must be set forth, &c. [But the action for the further recompence will not lie, unless

such recompence hath been previously assessed by the court out of which the process issued; neither the

jury, nor the judge at *nisi prius* being competent to do it. Pearson v. Hes, D. vgl. 556. Upon such

a sufficient debt may be brought. However, the more usual way is to proceed by attachment against the

witness

witness neglecting to attend. But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served. *Small v. Whitmil*, 2 Str. 1071. *Wakefield's case*, Ca. temp. Hardw. 313. and that his reasonable expences were paid or tendered to him. *Chapman v. Pointon*, 2 Str. 1150. *Stephenson v. Brookes*, Barnes, 33. *Dowles v. Johnson*, 1 Bl. Rep. 36.]

If a person, who can give evidence against one who is accused of felony, refuses to be bound to give evidence, at the general gaol-delivery, &c. the justice of peace may either commit to prison such person for refusing, or may bind him to his good behaviour, and to appear at the next gaol-delivery or quarter-sessions. Dalt. Just. 111.

Lord *Preston* was committed by the court of quarter-sessions for refusing to be sworn to give evidence to the grand jury on an indictment of high treason; he was brought by *habeas corpus* in *B. R.*; and *Holt*, C. J. said, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed. Salk. 273. Pl. 2.

[Where a witness is detained in prison, a *habeas corpus ad testificandum* is necessary to bring him up; for which an application is made to a judge, upon an affidavit, sworn to by the party applying (a), stating that he is a material witness, and willing to attend (b): Upon this application, the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed, and sealed (c). But a *habeas corpus ad testificandum* will not lie to bring up a prisoner of war (d); and where the application for it appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it (e). The writ being sued out, should be left with the sheriff, or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges (f).]

not require an indemnity against the prisoner's escape? *Id. ibid.*

It seems that by the common law the defendant, in capital cases, had no right to any process against his witnesses, without a special order of the court; but now by the 7 W. 3. c. 3. it is enacted, that all persons accused and indicted for any high treason, whereby any corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them at any trial or trials, as is usually granted to compel witnesses to appear against them; and now since the statute of 1 Anne, c. 9., which ordains, that the witnesses for the prisoner shall be sworn, process may be taken out against them of course in any cause whatsoever.

On a commission issuing out of Chancery for the examination of witnesses, there must be a *subpœna ad testificandum* taken out, directed to the witnesses, and a summons from two of the commissioners, of the time and place where they are to be examined; and, if the witness so summoned and served do not appear, the court will grant an attachment against him, unless he come up at his own expence to be examined before the examiner; or if he be summoned by the commissioners without a *subpœna ad testificandum*, and do not appear, the court will order such witness to attend at his own expence, and to be examined; and if he disobey such order, then an attachment shall go against him.

Tidd's Pr.
528.
(a) *Fortesc.*
396.
(b) *Cowp.*
672.
(c) *Imp.*
K. B.
(d) *Dougl.*
419.
(e) 3 *Burr.*
1440.
2 *Cr. Pr.*
248, 9.
Whe-
trier the
officer may
2 *Hawk.*
P. C. c. 45.
§ 30.

(E) Of the Manner of giving Evidence : And herein,

1. Where the Examination is in open Court ; and therein of such Questions as may be asked a Witness.

THE examination of witnesses *vivâ voce*, in open court, is justly esteemed one of the greatest excellences of our law, not only from the awe and reverence which the solemnity of the manner is supposed to produce in the witness, and the regard which from thence he must have for truth, but also from the benefit of cross-examining : and further, the air and manner of giving evidence often carry such convictions with them, as will induce the court and jury to believe or reject what the witness has sworn.

Hence it hath always been held as a settled rule, that in cases of life, no evidence is to be given against a prisoner, but in his presence.

Also in a civil cause, where the jury withdrew to confer about their verdict, one of the witnesses, that was before sworn on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant ; and complaint being made to the judge of assize of this misdemeanor, he examined the jury, who confessed all the matter, and that the evidence was the same in effect that was given before, & *non alia nec diversa* ; and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded.

But it is said, that a witness, who by reason of sickness, extreme age, or (a) other cause, cannot come to a trial, may, by order of court (b), be examined in the country before any judge of the court where the cause depends ; and the testimony so taken shall be allowed to be given in evidence at the trial.

he examined before a judge, by leave of the court, as well in criminal causes as in civil, where a sufficient reason appears to the court, as going to sea, &c. and then the other side may cross-examine them ; but for this *vide* Keb. 36. 249. 787. 2 Keb. 13. [(b) The order for this purpose cannot be obtained without consent ; the depositions of witnesses, upon interrogatories, not being the best evidence the nature of the case admits of. Tidd's Pr. 529. The court, however, will do every thing in their power to make the parties consent, when necessary ; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent, Cowp. 174. Doug. 419. ; and if the defendant refuses, the court will not give him judgment as in case of a nonsuit. Tidd's Pr. 529.]

But if a witness going to sea be by rule of court examined upon interrogatories before a judge, and the trial come on before he is gone, his deposition shall not be read, but he must appear ; for the rule was made on supposal of his absence.

Every person produced as a witness must, before he gives his evidence, be sworn to depose the truth, the whole truth, and nothing but the truth : this the law required in all cases, (c) except on indictments for capital offences, where by (d) immemorial practice, the witnesses against the king were not suffered to be sworn.

statute, ancient author, book, case or record, that in criminal cases the party accused should not have witnesses

Hob. 375.
Hale's Hist.
C. L. 253.
& 259.
Pref. to
Fortesc.
Rep. ii. to
iv.
Vaugh. Rep.
143, 144.

2 Hawk.
P. C. c. 46.
§ 1.

Cro. Eliz.
180.
Metcalfe
and Dean.

Style's Pract.
Reg. 671.
672 (a) In
Comb. 63.
it is said,
that wit-
nesses may

2 Salk. 691.
Pl. 4.

(c) Cro.
Car. 292.
2 Bulst. 147.
(d) But my
Lord Coke
says, that
he never
read in any

witnesses sworn for him; and therefore that there is not so much as *scintilla juris* against it. 3 Inst. 79. And in H. P. C. 264. it is said, that there is no known law against it. — But in 2 Hawk. P. C. c. 46. § 29. it being the constant practice not to suffer witnesses to be sworn against the king upon indictments of capital crimes, the judges presumed it founded originally on some statute, or other good foundation, and were therefore tender of departing from the settled practice.

But now by 1 Anne, c. 9. it is enacted, “That every person who shall be produced, or appear as a witness on the behalf of the prisoner, before he or she be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do; and, if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws and statutes of this realm are or may be inflicted upon persons convicted of wilful perjury.”

By the practice of the courts, if one be produced and sworn for the plaintiff or defendant, being once sworn, the other may examine him to any thing whatsoever, though he be the solicitor of the party who produces him (a): also either party may, on application to the court, have the witness examined apart, and out of the hearing of the others (b).

communicated to him by his client. (b) The like indulgence will be given to a prisoner; but he cannot demand it as of right. 4 Str. Tr. 9.]

[(a) But a solicitor cannot be compelled, and ought not to disclose matters confidentially.]

It is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes against which he cannot be presumed prepared to defend himself.

If a witness, when under examination, through surprise and inadvertency, gives a wrong answer to a question that is asked him, he is always allowed to recollect himself, and that, which he affirms on due deliberation, is to be taken for the truth. So, if he mistakes the true state of the question, in such a manner as shews, that it is rather owing to his weakness than perverseness, he cannot be punished for it as guilty of perjury.

If a person is produced as a witness for the king, upon a trial in an information, and he is guilty of perjury, he cannot be punished for it on the 5 Eliz. by way of indictment, which is the suit of the king; and such a one hath been discharged accordingly *.

2 Hawk. P. C. c. 46. § 20. 7 Mod. 119. Dougl. 593.

5 Mod. 350. and tit. Perjury.

Cro. Jac. 120. Price's case. * *Qu. de Loc?*

If a witness in giving evidence reflects on the character of another, or makes use of such words as are actionable; yet this being in a judicial way, he cannot be punished for it, nor will an action lie for such words.

[A witness shall not be allowed to read his evidence, but he may refresh his memory by any book or paper, if he can afterwards swear to the fact from recollection: but if he cannot swear to the fact from recollection any further than as finding it entered in a book or paper, the *original* book or paper must be produced.]

Roll. Rep. 61.

Roe v. Perkins, 3 Term Rep. 749.

2. Of Examinations and Proofs in Chancery.

Gillb. For.
Rom. 115,
16.

By the civil and canon law it was absolutely necessary, that there should be a citation taken out against the defendant previous to the examination of witnesses; and the reason is, that the defendant, if cited, might either examine or object to their credibility, or put such cross-interrogatories to them, as might bring out circumstances in his favour, which he would not have an opportunity to do, if he were not cited; but it was not necessary for the defendant to appear, because the citation is in his favour, and he might renounce a privilege introduced in his favour.

Hence it is, that in Chancery, after the plaintiff has replied to the defendant's answer, before he proceeds to examine any witnesses, he must take out a *subpœna* against the defendant to rejoin; but if the plaintiff serves the defendant with a *subpœna* to rejoin before he has filed a replication, the defendant appearing upon such *subpœna* shall have his costs taxed, because the plaintiff has not closed the contest of the answer before he served the *subpœna* to rejoin.

The defendant being served with a *subpœna* to rejoin, the plaintiff, of course, upon producing an affidavit thereof, is to have an order for the defendant to rejoin and join in commission in four days, giving the defendant's solicitor notice thereof; and the plaintiff thereupon may, in eight days afterwards, leaving his commissioners' names at the office, have, at his own costs, a commission *ex parte* directed to two of the plaintiff's commissioners, and two such as the officer shall think fit to nominate.

Also, it is usual to apply by petition or motion, that a *subpœna* to rejoin *return. immediate* may be awarded against the defendant; and that service thereof on the defendant's clerk may be deemed good service of the defendant; and to this is often added, especially in a country cause, that the defendant may join and strike commissioners' names sometimes in four days, sometimes in a week, that the plaintiff may have a commission *ex parte*, directed to his own commissioners; and all this is of course.

But the more usual way is for each party to name four commissioners for the examination of witnesses, and two a-piece are struck out of each side; and if a defendant joins in a commission and names commissioners, and yet afterwards refuses to strike, the court, upon petition, will strike out such two of them as they please, and the commission shall go to such of the four as are left standing.

But here it is necessary to observe, that there is an office called the Examiner's Office, which extends itself, and has a right to examine all witnesses in town, or within ten miles of the town, which is the circuit of the court; and if any commission be made out, or witnesses examined within that district, the depositions taken by commission will, upon complaint, be suppressed, and the clerk who made out the commission will stand committed for a misbehaviour, and breach of the known duty of his office,

When

When interrogatories are filed in the examiner's office, the witness is carried to the seat of the examiner, and a note in writing is there taken of his name and place of abode, to the end the other side may cross-examine, if they think fit; and, to prevent the personating of any witness, he is constantly carried in person, and, shewn at the seat of the adverse party's clerk in Chancery; this being done, he returns back to the examiner's office, and is there examined.

If interrogatories are filed for his cross-examination, the party who produces him must see that he stays, or returns, and attends to be examined; but if no such interrogatories are filed, or he is not demanded to be cross-examined at the same time when he is under examination, and if he goes away about his business, the party who intends to cross-examine him must get him examined as well as he can; and the adverse party is not in that case bound to produce him over again, to attend to be cross-examined, since it was the party's fault he had not his interrogatories ready to have cross-examined him whilst he was under his former examination.

If the examiner is served with an order whereby publication is to pass on such a day, he cannot afterwards examine any witnesses, though it often falls out, that three or four witnesses have been before that time sworn to the interrogatories, but have not attended to be examined: in this case the party cannot examine them without leave of the court, which is seldom denied on motion.

If a witness is duly *subpoenaed* to attend and be examined, and he refuses to attend, then, upon a certificate from the examiner, that interrogatories are filed, and the witness hath not attended to be examined, he shall stand committed, unless he attends and is examined in four days after notice; and this is sometimes allowed as a good cause for enlarging publication or putting off the cause; but where publication is actually passed, and depositions are delivered out, if the party moves for enlarging publication, he must offer good reasons, by affidavit, of some material witnesses whom he hath to examine, and the reasons why they could not attend and be examined before publication passed.

And in this case the plaintiff or defendant, as the case falls out, must make oath, and so must his clerk or solicitor, that they have neither seen, heard, read, nor been informed of any of the contents of the depositions taken in that cause, nor will they see, hear, read, or be informed of the same, till publication is duly passed in the cause; and upon such an affidavit it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses: but he is to be limited to a time, and so as not to put off the hearing of the cause; for otherwise it would be hard to put the defendant to hear his cause without proof.

If the party examines some witnesses in town, and others by commission, he is not obliged to exhibit or file his whole set of interrogatories in the examiner's office; he only files such and such alone as he hath occasion to examine in town; for if this were

otherwise, it would put the plaintiff to a double expence of paying for copies of the whole interrogatories twice over.

Gilb. For.
Rom. 117.

Here also we must observe, that anciently the examination was before a judge of the court, who was to consider whether the witness answered readily, or whether he brought a story, formed, to the judge: the examination in Chancery was originally before the master of the rolls, who was one of the judges of the court; and therefore it should seem that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canonists may be upon the *libellus articulatus*; but afterwards the master of the rolls having left the examination of the witnesses to his clerks, as the barons of the Exchequer did to theirs, thenceforward the judge did not, but the counsel for the party, whose witnesses were to be examined, framed the interrogatories upon which the clerks examined; and so thenceforward it became the practice to send the commission to the commissioners to examine upon interrogatories, as the examiners did above.

Id. 113.

But as witnesses often lived remote from the court, it was thought more convenient to appoint commissioners to examine such witnesses, the court sending a notary of their own, who was often in commission with them, and with those commissions a copy of the articles. The commissioners are to examine themselves, and cannot delegate their power, for *delegata potestas non potest delegari*.

Id. ibid.

The commissioners were likewise to be indifferent, for, upon exception to the partiality of any of them, the court will supply their places by putting in others; for though they are named by the parties, yet that is but by way of proposal to the court; for they are the ministers of the court, and therefore must be impartial.

(a) But there seems to be no such rule or distinction at this day, and therefore it hath

These commissioners were to have their charges, and the (a) rule was, that rich persons were to have their expences only, because they were not to be paid for their duty; but the poor were to have, not only their expences, but the price of their labour over and above, that they might not be damaged for doing their duty.

been resolved, that a commissioner may maintain an action for the labour and pains he has been at in the execution of the commission. Carth. 208.

The interrogatories were anciently annexed to the commission, and so now they are supposed to be; but by consent of parties they are delivered to the commissioners at the opening of the commission; and this is the present practice.

The commissioners can only examine upon the set of interrogatories that are first put in before them, and no new ones can be examined upon before them, without leave of the court, because their commission is to examine upon such interrogatories as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission.

But before the examiner they may examine upon a new set of interrogatories, because that is presumed to be the examination of the

the judge ; and the judge might examine upon interrogatories *ex re nata* out of the articles.

The plaintiff has regularly the carriage of the commission, and so is to appoint time and place ; but if the defendant supposes that the plaintiff will aggrieve him by such appointment, he may move for a duplicate of the commission, and that the officer may appoint time and place.

But if the officer appoints time and place, yet the commissioners may agree to adjourn, because the appointment of the master is only for the opening of the commission ; and, therefore, if the commissioners agree, they have yet power to make proper adjournments.

If the plaintiff, or his commissioners, abuse the carriage of the commission, by making unnecessary adjournments, or an irregular examination of the witnesses, that will entitle the defendant to a commission of his own, and he may have the carriage of it himself, because he shall not be obliged to produce and examine his witnesses where it cannot be done impartially.

The fair examination by commissioners is not to adjourn without necessity, because that would be to harass the defendant by obliging him to travel from place to place to cross-examine ; but if it be necessary, they may adjourn, not only as to time, but place.

And this affair must be performed as far as it is possible *uno actu*, that there may be as little opportunity as possible to divulge the depositions, that neither side may better their proof.

When a witness is produced, he must first be examined upon the interrogatories of the producer, and then forthwith, without suffering him to go abroad, upon the cross-interrogatories of the other side ; and the depositions are to be read over to him, every sheet whereof he is to sign, that so they may have the sense of the witness, without being tampered with.

The depositions, thus taken, are to be bound up, and signed and sealed by the commissioners, and sent by a messenger of their own to the court out of which the commission issued, who is to swear that they were not opened or altered since they were delivered to him.

If there be due notice of executing the commission, and at the day appointed the commissioners meet, and the commission be opened, but no witnesses examined nor adjournment made, the commission is lost ; but if it be not opened, they may give new notice, and proceed, unless in the mean time the court be moved, and order be made to pay the costs of the former day before they proceed. And the reason of this rule seems to be, that the not adjourning is a refusal of the commissioners to act any further upon it ; for though the court itself never adjourns, because it is always open ; yet the delegated power must adjourn, because they have no standing and constant power, as the seal has, but their power arises from the words of their commission, which are *quod mandamus quod ad certas dies & locos quos ad hoc provideritis testes præd. coram vobis venire faciatis & advocetis* ; so that if they do

do not provide time and place by an adjournment, they have no authority further to act by that commission, for the delegated authority must pursue the words of the commission, else it will be construed a refusal to act. But if they do not open the commission, their not acting at that time will not be construed as a refusal to act; but it is an harassing of the defendant, for which he may complain to the court and have his redress; and the not acting before the commission is opened, is not construed to be a refusal, because they do not know what their authority is till the commission is opened.

Where one of the plaintiff's commissioners and one of the defendant's meet, and the commissioner for the plaintiff refuses to act, the commission is lost; but the plaintiff shall pay the defendant his costs, and the defendant shall have a new commission and the carriage of it: and so it is when any commission is lost through the default of him that has the carriage of it; for he is unworthy to have the carriage of the commission, who appears to make default in the execution of it.

If due notice be given, and the one side proceed and examine his witnesses; the other, if he does not examine, shall not have a new commission, unless affidavit be made of some reasonable cause of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction or knowledge, have seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication: and the reason hereof is, that the defendant may not have an opportunity to know what has been proved for the plaintiff, and so have an opportunity to contest it.

And where such a new commission is granted, it shall all be at the charge of the defendant, and the plaintiff is permitted to cross-examine without charge.

But if the plaintiff will, upon such new commission, produce any witnesses, he must be at equal charges of the commission, because he has equal benefit by the examination of his own witnesses.

But he at whose instance a commission is renewed, must examine all his witnesses upon such commission, or in court, before the return of it, because he cannot be indulged a farther probatory term.

If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in interrogatories, he shall never afterwards examine, unless upon special order of court, upon good cause shewn, because he might form his interrogatories upon the discovery made to his commissioners of what the other side examined to.

Where the commissioners meet and examine, and afterwards adjourn, and one of the defendant's commissioners takes away the commission, and the other commissioners meet at the day adjourned, and examine witnesses and return the depositions, the court will order such depositions to lie, and the *subpœna duces tecum* to issue against the commissioner, that he may bring in the authority

rity by virtue of which the depositions were taken; for if they had a proper authority, the not having the commission before them does not impeach the depositions.

There must be fourteen days notice given by the commissioners to all the defendants, of the time and place of the execution of the commission, else it is not good notice, and the depositions will stand suppressed for irregularity, in not pursuing the tenor of the commission. This rule seems to be taken from the common law, which requires fourteen days notice of trial; but where it is a short vacation, as between *Easter* and *Trinity term*, ten days, or less, is good notice.

No commission can be executed in term-time, unless by leave of the court, or consent of the parties; for the commissioners being generally country attorneys, it is more than probable they are in town attending the term, on their other clients' affairs, and, consequently, cannot attend upon the execution of the commission.

If two of the plaintiff's commissioners attend at the time and place appointed for the execution of the commission, they may proceed therein *ex parte*, if the defendant's commissioners do not then attend; but if the defendant's commissioners attend at the time and place appointed, and the plaintiff's commissioners are not there, they cannot go on, because the plaintiff having the carriage of the commission, he will not produce it, if he is disappointed of his commissioners, and, consequently, there can be no proceedings for want of the commission. This makes a duplicate of the commission more necessary; for in this case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but where there is no duplicate, and the defendant's commissioners attend at the time appointed, and none attend for the plaintiff, the party grieved is to be recompensed in costs upon complaint made thereof to the court; and in that case the court will give him leave to sue out another commission.

There must, at least, one commissioner attend on each side; for if the plaintiff hath but one commissioner that attends on his side, he cannot proceed to execute the commission, unless one of the defendant's commissioners attends and joins with him therein; but if one commissioner for each party attend, they may proceed in the execution of the commission, and not otherwise.

It having been found by common experience, that country commissioners were apt to publish and divulge all the evidence taken before them, and this even before the passing of publication, and that in such a manner, as that it could rarely, if ever, be detected, because they usually disclosed it to the attorney or solicitor who employed them, and who was always their friend; and since the very life and vitals of almost every cause, and of every man's property, lie in keeping close and secret his evidence, till after the depositions are published, because after that there is an end of examining unless it is to prove exhibits, which may be done
after

[(a) No examination is allowed to points that would admit of a cross-examination. 2 Vez. 480.]

after the hearing, or by order *viva voce*, and then they must be particularly named in the order, that the other side may have notice what is to be proved; (and this indeed can only be to prove the execution of deeds, or signing receipts or acquittances; but a man cannot have leave to prove a will *viva voce* at the hearing, because the due execution may come in question (a), which cannot be examined at the hearing *ore tenus*, but ought to have been done before publication passed).

To remedy this inconvenience, the following order was made the 9th of *February*, the 8th year of *G. 1.* in Chancery:

Whereas this court hath been informed, that commissioners and their clerks attending the execution of commissions for examination of witnesses in causes depending in this court, do frequently before publication is passed, and even before the executing of such commissions, disclose to or inform the parties, or their agents, of the contents of the depositions of witnesses taken on such commissions, which leads to introduce perjury, and occasions tedious and unnecessary examinations; for remedying and preventing whereof for the future, the right honourable the lord high chancellor of *Great Britain*, by and with the advice and assistance of the right honourable the master of the rolls, doth order, that from and after the last day of this present *Hilary term*, where any commission issues for examination of witnesses, all and every the commissioners named in such commission shall, before they act in or be present at the swearing or examining any witness or witnesses upon interrogatories in such causes, severally take the oath following: "You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you, and you shall not publish, disclose, or make known to any person or persons whatsoever, except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you and the other commissioners in the said commission named, or any of them, by virtue of the said commission, until publication shall pass by rule or order of the high court of Chancery."—Which oath is to be annexed in a schedule to the said commission.—And it is further ordered, that all and every the clerk or clerks attending the execution of such commission, and employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses examined on such commission, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at the execution of such commission, severally take the oath following: "You shall truly and faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners,

" or

“ or any of them named in the commission hereunto annexed,
 “ as far forth as you are directed and employed by the said com-
 “ missioners, or any of them, to take, write down, or engross the
 “ said depositions, or any of them, and you shall not publish,
 “ disclose, or make known to any person or persons whatsoever,
 “ the contents of all or any of the depositions of the witnesses,
 “ or any of them, to be taken, wrote down, transcribed, or en-
 “ grossed by you, or whereto you shall have recourse, or be any
 “ ways privy, until publication shall pass by rule or order of the
 “ high court of Chancery.”—Which oath is likewise to be an-
 nexed in the same schedule to the said commission.—Which oaths
 the said commissioners are by such commissions to be empowered
 jointly and severally to administer to each other, and also to the
 persons attending as clerks to the said commissioners.

If any practiser, or other person, goes about to tamper with
 or suborn any witness, upon complaint made thereof, and upon
 examination of the matter upon oath, he must stand committed.

When the parties have examined, they give a rule, as they do
 in the civil and canon law for publication; and if no cause be
 shewn to the contrary within four days, the rule is made ab-
 solute.

When publication is moved to be enlarged, it must be upon
 notice, and upon good reasons offered to the court, and upon af-
 fidavits, shewing the reasons why the party could not examine his
 witnesses sooner; and it is seldom or never done where it is to put
 off the hearing of the cause.

But where the adverse party can suffer no injury, as where the
 cause is not set down, or where the party is not served to hear
 judgment, there the court will enlarge publication for asking for.

And in some cases they will do it, though the cause is set
 down, and the party is served to hear judgment; but this must be
 when it is shewn to the court, that it is not possible for the cause
 to come on very soon, and the court will in this case expect the
 party to appear *gratis* to hear judgment, on six days notice to be
 given to his clerk in court, and pray no day over, and will often
 oblige him to take no advantage for want of parties at the hear-
 ing; this forwards the plaintiff; for if default is made at the
 hearing, the decree cannot be made absolute till the next succeed-
 ing term; but if the party who moves to enlarge publication,
 will not appear *gratis*, and pray no day over, he is often denied
 his motion, and with great justice, because in that case he in-
 tends only delay, which the courts always avoid when in their
 power.

When publication is passed, and the depositions are copied and
 delivered out, and either party has a mind to examine touching the
 credit or reputation of any of the witnesses, the way is,

They must file objections or articles, so called, in the exa-
 miner's office; these contain in substance the objections they make
 to the reputation of the witness, as in cases of felony, burglary,
 perjury, forgery, standing in the pillory, or any other criminal case

that

that would disable the party from being a good witness at the common law ; for the rule of evidence is the same in equity as at law ; and if the party cannot be a good witness at law, no more can he be in equity ; these articles may be founded upon the party's leading a lewd life, or being a common drunkard or swearer, or of ill repute and character in his neighbourhood, a common vagabond, a man not known, that hath no abode, or such like ; though all these latter objections seldom come to any thing ; for notwithstanding these, the man is a legal witness, and the court will hear his evidence, and judge of the probability or improbability accordingly.

These articles being filed, and a certificate being produced from the examiner that they are so, the court, upon application, by motion or petition (or, it may be done without) will give leave to the party to examine witnesses thereon ; and the other party, who is to support the credit and reputation of his witness, may examine accordingly *toties quoties*, and their depositions must be published, as in other cases ; but this is a case which but very rarely happens, and, generally speaking, it ends in nothing more than putting the party to an expence to no purpose.

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories examined by each side, if they find them to be leading or impertinent, then it is the proper time to refer them to a master, for being too leading, impertinent, or scandalous ; this is done by motion or petition of course.

If the master reports the interrogatories to be leading, and this report is not excepted to, then all the depositions taken to these interrogatories must stand suppressed, as of course, by motion or petition ; but if the report is excepted to, as, on the one hand, the court never countenances leading or impertinent interrogatories ; so, on the other hand, they are not over curious in those matters, because it may fall out that the interrogatories be reported leading in the very vital of the examination, and on the very point on which the cause turns ; and when this comes to be the case, the party who referred them hath gained his end ; for perhaps he had a very bad cause, if the depositions had stood ; whereas if they are suppressed, he hath a very good one, since his adversary must have his cause without any proof at all, unless the court is pleased to grant him another commission on payment of costs, for his leading interrogatories, which is seldom or never done after the depositions are published. And it is hard, that in equity, a man should be deprived of a plain right, through the slip of another man's pen, or the inadvertency or unskilfulness of his counsel's penning his interrogatories ; and therefore, if it is possible for the court to help him, they will, from the manifest inconvenience which must attend such a case : indeed, if the interrogatories are reported to be leading in points upon which the jet of the cause does not turn, if the depositions in these points should be suppressed, and the party have evidence enough left
without

without it, there is no hurt done; but if the merits and very life turns upon it, he will struggle to the last before he will let his depositions be suppressed.

Therefore, where interrogatories and the depositions of a witness taken on them had been suppressed, for that the interrogatories were leading, and the court being moved, that a new set of interrogatories might be drawn, and settled by the master for the examination of this witness, whose evidence was very material, and yet would be wholly lost, unless the court would indulge them this way, and though the practice was admitted to be always against it, and it was urged to be of dangerous consequence; yet one precedent being produced to this purpose; and the interrogatories, which had been suppressed, being such as might be drawn by many other counsel, without any apprehension of their being leading, the court, to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in, and settled by a master for his examination over again.

If the commissioners misbehave themselves, or if the commission is executed contrary to notice given to the party, or if the depositions returned by commission are so engrossed, or so interlined, that they are not legible, in those and many other cases of the like nature, there may be good reason to suppress the depositions; but in this last case the record or engrossment of the depositions is always brought into court by the proper officer; the court take the engrossment into their hands; and if it is possible to be read, or if it is handed down to the six clerk, and he can read it, they will hardly suppress the depositions, or put the parties to a new trouble, or to the expence of examining all over again.

When the depositions are copied, they must be signed by the examiner or proper six clerk; for if either of the six clerks, who constantly attend the court every day of hearing, stands up and says, that the books are not signed, they are not to be admitted to be read.

The civilians had a manner of examining witnesses (*a*) in *perpetuam rei memoriam*, which was two-fold, either the common examination, or in *meliori forma*: the common examination was, when witnesses were very old and infirm, or sick and in danger of death, or were going into other countries; in this case it was usual to file a libel, and without staying for the *litis contestatio*, the plaintiff examined his witnesses immediately, and gave notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses if he thought fit, and these depositions stood good, in case the witness died or went abroad; but the plaintiff was obliged *edere actionem* within a year, otherwise these examinations went for nothing; but if the witnesses lived, or did not go abroad into other countries, then they were to be examined *post litem contestatam*.

The examination in *perpetuam rei memoriam* in *meliori forma* is *ad transumenda instrumenta*; and in this case there must be a *litis contestatio*

(a) In what cases a bill to examine witnesses in *perpetuam rei memoriam* will now lie, vide Vern. 105. 105. 331. 354. 2 Vern. 159. Abr. Eq. 253. 4. 1 Atk. 571. 620. 1 P. Wms. 117. 1 Br. Ch. Rep. 419. 2 P. Wms. 162.

contestatio before the examination, because there is no need of so much in proving instruments, as there is where the witnesses are likely to die, or are going into remote parts; in these cases they are not confined to proceed in any action upon these instruments within a year.

[A witness may be examined *de bene esse* on affidavit that the thing to be examined into lies in the knowledge only of the witness, though there be no affidavit of his being

old, or infirm, or in danger of dying. *Shirley v. Ferrers*, 3 P. Wms. 78. *Hankin v. Middleditch*, 2 Br. Ch. Rep. 641.]

But now the usual method is, where one man brings a bill against another, and hath a most material witness to examine, upon affidavit made, that this witness is in a languishing condition or danger of dying before he can be examined in chief, or where the witness is going a long voyage to *India*, or other remote parts, from whence he cannot return by the time he is to be examined in chief, and to which place he is bound, and cannot possibly stay; in either of these cases, the court upon motion or petition of either party will, and never denies to make an order as of course, for leave to examine such witness *de bene esse*, saving just exceptions to the other side.

If the witness lives till he can be examined in chief, he must be examined over again as other witnesses in chief are; but if he dies in the mean time, then, upon producing and proving the register of his death, the party for whose benefit he was examined, may apply, by petition or motion, for an order, with liberty to publish his depositions, (for they cannot be published without such an order); and to the petition must be annexed a certificate of the death of the witness, and the party must shew that he died before the time that he could be examined in chief; and hereupon the court makes an order, not only to publish his depositions, but to read them as a witness at the hearing, saving exceptions; and notice of this order is always given to the adverse clerk to prevent surprise, and give him an opportunity to object thereto, as he shall see occasion.

If the witness beyond sea be not returned, there must be an affidavit of it, and that the party had not heard from him of such a time, nor doth he know whether he is living or dead; and in this case there will be the like order, as in the case of the witness who died before he could be examined in chief.

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c. as Evidence.

Co. Lit.
283. a.

(a) That a jury may and must take knowledge of any particular record, either patent,

THE word *evidence*, as has been observed, comprehends not only the testimony of witnesses, but also matters of record, as letters patent, fines, recoveries, enrolments, and the like; writings under seal, as charters and deeds; and other writings without seal, as court-rolls, accounts, &c. and (a) records are said to prove themselves, and to admit of no averment against the truth of them.

statute, or judgment, if it be given in evidence to them, for that is their *allegata* verbally alleged

alleged and produced, if it make to the issue. Hob. 227. & vide Leon. 206. And. 37. Plow. 92: 1. 411. Dyer, 118. 9 Co. 12. Co. Lit. 227.

[The first sort of records are acts of parliament: these are the memorials of the legislature, and therefore are the highest and most absolute proof: and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private persons, and are thence called private acts. Gilb. L. E. 11.

On general acts of parliament, the printed statute book is evidence; not that the printed statutes are the perfect and authentic copies of the records themselves, for there is no absolute assurance of their exactness, but every person is supposed to apprehend and know the law which he is bound to observe, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already. Id. 12. 2 Salk. 566. 10 Mod. 216. 126. 181. Keb. 2. Jenk. Cent. 230. pl. 5. Hale's Hist. of the Common Law, 90.

15, 16. Style, 462. L. E. 89. Tri. per Pais, 226, 232. Stra. 446. 3 R. S. L. 90.

In private acts of parliament the printed statute book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the parliament roll; for private statutes do not concern the kingdom in general, and therefore no man is understood to be possessed of them, as he is of those general laws which are set up as the regulation of his own actions, and, consequently, the private statutes are no intimation to what is already known, but they are the rules and decrees that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same punctuality as the copies of all other records.

But my Lord Chief Justice *Parker*, in the case of the college of physicians and doctor *West*, allowed the printed statute to be evidence of the truth of a private act of parliament touching the institutions of the college. 10 Mod. 353. But this matter of evidence does not appear there. Ld. Raym. 472.

And a private act of parliament in print that concerns a whole country, as the act of *Bedford Levels*, for re-building *Tiverton*, &c. may be given in evidence without comparing it with the record. Bull. N. P. 225. And these things are the rather admitted, because they gain some authority by being printed by the king's printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. And for this reason, printed copies of other things of as publick a nature have been admitted in evidence without being compared with the original; as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. So, the Gazette is evidence of all acts of state. So, the articles of war, as printed by the king's printer, are evidence of such articles. Vide Douglass. 594. n. R. v. Holt, 5 Term Rep. 436.

The next thing is the copies of all other records, and they are twofold; under seal, and not under seal.

10 Mod.
125, 126.

First, under seal, and these are called by a particular name, exemplifications, and are of better credit than any sworn copy: for the courts of justice that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examinations, than any other person is or can be: and besides, there is more credit to be given to their seal, than to the testimony of any private person; and therefore we are more sure of a fair and perfect copy when it comes attested under their seals, than if it were a copy sworn to by any private person whatsoever.

Exemplifications are twofold; under the broad seal, or under the seal of the court.

Sid. 145,
146.
Hard. 118.
Pl. Com.
411. a.
3 Inst. 173.

Under the broad seal; such exemplifications are of themselves records of the greatest validity, to which the jury ought to give credit, under the penalty of an attainder.

When a record is exemplified under the great seal, it must either be a record of the court of Chancery, or be sent for into the Chancery by a *certiorari*, for the Chancery is the centre of all the courts, and thence the subjects receive a copy under the attestation of the great seal: for in the first distribution of the courts, the Chancery held the broad seal, whence the authority issued to all proceedings, and those proceedings cannot be copied under the great seal, unless they come into the court where that seal is lodged.

Foll. N. P.
227.

Nothing but records may be given in evidence exemplified under the broad seal; for these being preserved by the proper officer of every court from all rasure and corruption, are supposed to be so fair and unblotted, that there can be no danger in the exemplification. But the exemplification of deeds under the broad seal cannot be admitted in evidence, for these being in the custody of the party and not of the law, are subject to rasures and interlineations, and therefore ought to be produced themselves as the best evidence of the contract.

3 Inst. 173.
But this rule
is to be
taken with
exceptions as see hereafter.

When any record is exemplified, the whole record must be exemplified, for the construction must be taken from the view of the matter taken together.

The second sort of copies under seal are the exemplifications under the seal of the court, and these are of higher credit than a sworn copy, for the reasons formerly given.

Copies not under seal are of two sorts, 1. Sworn copies, and 2. Office copies.

1. Sworn copies; these must be of the records brought into court in parchment, and not of a judgment in paper signed by the master, though upon such judgment you may take out execution, for it does not become a permanent matter till it be delivered into court, and there fixed as memorandums or rolls of that court, and until it be a roll of that court it is transferable any where, and so doth not come under the reason of law, that permits us to give a copy in evidence.

Vent. 257.
Syl. Pr.
Reg. 205.

Where a record is lost, a copy of it may be read without swearing it to be a true copy, for the record is in the custody of the law, and

not

not of the party, and therefore if lost, there ought to be no injury arising to the party's private right; and, consequently, if it be lost, the copy must be admitted without swearing any examination concerning it, since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination.

But in such cases as these, the instruments must be according to the rules required by the civil law: they must be *vetustate temporis, aut judiciaria cognitione roborata*.

So, the copy of the decree of tithes in *London*, has been often given in evidence without proving it a true copy, because the original is lost.

So, a recovery of lands in ancient demesne was given in evidence, where the original was lost, and possession had gone a long time according to the recovery.

When a man gives in evidence the sworn copy of a record, he must give the whole copy of the record in evidence, for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question.

Secondly, Office copies may be given in evidence.

Here the difference is to be taken between a copy authenticated by a person trusted to that purpose, for there that copy is evidence, and a copy given out by the officer of the court that is not trusted to that purpose, for that is not evidence, without proving it actually examined.

The reason of the difference is, that where the law hath appointed any person for any purpose, the law must trust him as far as he acts under the authority that the law has lodged in him; otherwise it would be to give credit to another officer and not to him at the same time.

Therefore the chirograph of a fine is evidence to all persons of such a fine, for the chirographer is appointed to give out copies between the parties of those agreements that are lodged of record, and therefore his copy must be admitted as evidence without further dispute.

So, where a deed is enrolled, the indorsement of that enrolment is evidence, without further proof of the deed, because the officer is intrusted to authenticate such deeds by enrolment; and when such officer indorseth, that he hath done it pursuant to the law, then the law which intrusted him with the authority of doing it, ought to give credit to what he has done.

on the margin, is sufficient evidence of the enrolment. Dougl. 36.

But if an officer of the court, who is not intrusted to that purpose, makes out a copy, they ought to prove it examined; the reason is, because being no part of his office, he is but a private man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore it is not enough to give in evidence a copy of a judgment, though it be indorsed to have been examined by the

Mod. 117.
Saik. 285.
L. E. 89.
pl. 18.

Carvin.
Dig. 292.
Mod. 117.

Vent. 257.

Ibid.

Tri. per
Pais, 166.
3 Inst. 173.
Post. 27.
Ante, 17.

Pl. Com.
110. b.

See 10 Ann.
c. 18.
8 Geo. 2.
c. 6. § 21.
In a duchy
lease, the
certificate of
the auditor

clerk of the Treasury, because it is not part of the necessary office of such clerk: for he is only intrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them.

So, if the deed enrolled be lost, and the clerk of the assize make out a copy of the enrolment only, this is no evidence, without proving it examined, because the clerk is intrusted to authenticate the deed itself by enrolment, and not to give out copies of the enrolment of that deed.

The office copies of depositions are evidence in Chancery, but not at common law, without examination with the roll; for the court of Chancery have for convenience allowed their office copies to be evidence in their own court, and have empowered their officers to make out such copies as should be evidence, but the particular rules of their court are not taken notice of by the courts of common law.

Where a fine with proclamations is to be a bar to a stranger, there the proclamations must be examined from the roll, for although the chirographer is authorized by the common law to make out copies to the parties of the fine itself, yet he is not appointed by the statute to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.

Having thus shewn how the record is to be given in evidence, by the proving of a copy, we must in the next place see in what manner, and in what cases, they ought to be evidence.

And here, in the first place, it is regularly true, that when the record is pleaded and appears in the allegations, it must be tried on the issue *nul tiel record*; but where the issue is upon fact, the record may be given in evidence to support that fact.

When the issue is *nul tiel record*, the record must be brought *sub pede sigilli*; but where the record is offered to a jury, any of the forementioned copies are evidence.

But out of this rule there is an exception, that where the record is inducement, and not the gist of the action, there, it is not of itself traversable, but must be given in evidence on the proof of the action; for nothing can be of itself traversable, that doth not make a full end of the matter in question.

When any person produces a record, it must be so much at least as concerns the matter in question, for it is no evidence unless you shew the whole import of the matter; for the preceding or following words may give it quite another face.

Where a recovery is ancient, you need not prove any seisin in the tenant to the *præcipe*, but otherwise it is in a modern recovery; for in an ancient recovery, the presumption is for the recoveror, for the recoveror shall be supposed to be seised at the time of the recovery, since he hath been seised ever since; but in a modern recovery the seisin must be proved, because the *præcipe* doth not lie against the person that is seised of the freehold, and so the recovery wants a foundation, because the action is not prosecuted against the tenant of the freehold.

Tenant for life, the remainder in fee; he in the remainder in fee suffers a common recovery with single voucher, and this recovery

Chute and
Pound.
Trin. Ass.
1700.

See Trin. per
Pais, 209.

Style, 22.
Sid. 145.

Sid. 145,
146.

Trin. per
Pais, 166.
1 Inst. 173.
Mod. 117.
Ant. 23.
Mod. 117.

Green v.
Pound.
Vent. 257.

recovery is ancient : The court will presume a surrender of the tenant, because when there hath been a constant enjoyment under that recovery, it shall be supposed to be a lawful foundation, for unless there had been a lawful tenant to the *præcipe*, it must be supposed, that it would have been controverted and overthrown.

years standing, the court will, *without any other circumstances*, presume a surrender of the estate for life. But in that very case, the court did admit other evidence of the surrender, namely, the attorney's book, the attorney himself being dead, wherein, among his charges for suffering the recovery, were two items for drawing and engrossing a surrender of the life-estate. Neither doth the above case of *Green v. Froud*, (for there possession had accompanied the recovery,) nor what is said in *Pig. 41.*, warrant this general position. And therefore, in the case of *Goodtitle v. Duke of Chandois*, 2 Burr. 1065., where tenant in tail of a considerable estate, part in possession, the residue held by a widow on whom it was settled for life, suffered a recovery of the whole, and settled it on the Duke of Chandois, and the duke on the death of the tenant in tail entered into that part of which he died in possession, and on the death of the widow on the remainder; on which the reversioner brought an ejectment to recover this remainder, on the ground that there was no surrender of the widow's life-estate; for that no actual surrender was proved, and no sort of evidence having been offered to make such surrender probable, it could not be presumed; the court of K. B. held, that the length of time was not to be reckoned from the date of the recovery, but from the possession going with the recovery : that in this case there was no possession after the death of the tenant for life, for the reversioner brought his ejectment immediately : that where the person suffering the recovery, has a right to suffer it, the court will presume all things to have been regular, unless the contrary appear; but that here, the recoveror, being only tenant in tail in remainder, and the life-estate under the same settlement still subsisting at the time of suffering the recovery, it was most clear he had no power to alien or bar.—And even where the person suffering the recovery, has a clear right to alien, yet the court will not, from mere length of time, presume proper tenants to the *præcipes*, where it appears from the deeds that proper parties did not join, and the uses are declared to have been warranted by those deeds. *Keen v. Earl of Effingham*, 2 Str. 1267.

It is laid down in the case of *Warren v. Greaville*, 2 Str. 1129. that after a recovery of 40

But if there be tenant for life, the remainder in fee, and he in remainder suffer a common recovery with single voucher, and this recovery is modern, this record will not give a title, for the freehold is in tenant for life, and the *præcipe* ought to be brought against him; and so there is no lawful action commenced. Vent. 257.

If there be tenant for life, with remainder in tail, and they both join in a common recovery with single voucher, this will not bar the tail, because the remainder-man is not tenant to the *præcipe*; and in this case the *præcipe* is brought against them both as joint-tenants, and he in remainder hath no immediate estate of freehold in him, and the remainder-man is not bound by the recovery had against the tenant for life, unless he comes in upon the aid prayer, though the remainder is turned to a right by such recovery. Moor, 256; Pl. 402. 2 Roll. Abr. 395. Pig. of Rec. 36.

But if there be tenant for life, the remainder in tail, and they suffer a recovery, and come in as vouches on the double voucher, then he in remainder is barred, because he in remainder is as properly called in as vouchee, as if he had been called in on the aid prayer of tenant for life, and then when he takes up the defence, and makes default, he must be barred by the judgment, as for the want of a title appearing; for where any person is properly in court, and doth not defend his title, he is as properly barred as he who hath no title at all; and when tenant in tail is barred for want of title, the issue can never after recover in his *formdon*. 2 Roll. Abr. 396.

Although, regularly, no recovery or judgment is to be admitted in evidence but against parties or privies, yet under some circumstances they may; as in an information in nature of a *quo warranto*, a judgment of ouster was allowed to be given in evidence Bull. N. P. 231. R. v. Hebden, 2 Str. 1159. Andr. 389.

5 Term
Rep. 72.

evidence to prove the ouster of a third person, the mayor, by whom the defendant was admitted. And such evidence is conclusive, unless the judgment can be impeached as obtained by fraud.

Lewis and
Cl 1763,
Term
Pasch.
1700.
Trial at bar.

As to verdicts; if a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial was not had for the same lands; for the verdict in such cases is a very persuading evidence, because what twelve men have already thought of the fact, may be supposed fit to direct the determination of the present jury; for to go contrary to what a former jury have decided in relation to any fact, is to arraign the honesty and sincerity of their judgment; and there is that common credit to be given to twelve men of the country, discerning of any fact upon their oaths, that no second jury ought rashly to depart from their judgment: Their verdict also further stands in credit, because the jury must be supposed honest men, and men of clear reputation, their verdict not having been attainted by the party against whom it was given.

Lewis and
Clerges.

But then the verdict ought to be between the same parties, because otherwise a man would be bound by a decision, where he had not the liberty to cross-examine, and nothing can be more contrary to natural justice, than that any body should be injured by any determination that he was not at liberty to controvert; for that is to set up a decision unexamined, in prejudice of a cause that is under examination. Besides, one that is not party to the trial has no redress for the injury if the verdict were false, for he cannot have an attain, and therefore ought not to be injured by the verdict.

Ibid. See
Stra. 308.
2 Str. 1151.
See Carth.
79. 181.
5 Mod. 386.
2 Jones, 221.
3 Mod. 142.
4 Sid. 325.

But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and if the verdict arise upon the same question, then it is no doubt a good evidence; for every matter is evidence that amounts to proof of the point in question.

In an action of trespass, the indictment for the same trespass and verdict thereupon, shall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cause (as we shall hereafter shew that it is not) then cannot the verdict be any evidence that is founded only on the party's own oath; for what cannot be evidence directly, cannot be made evidence by any such circuitry.

This is the
practice ex
relatione Mr.
Phipps,
1700.

Objection.

But where the verdict on the indictment is founded on another evidence, besides the party's own oath, there, the verdict may be given in evidence; for, there, this verdict seems to be under the same general rule with all others, and there the judgment of twelve men on the fact ought to sway in determination of the same fact, whether the verdict be on indictment or action: But yet it may be objected, that the fact might find credit from the party's own oath, which ought not to support the action, and since the evidence is so intermixed, that it doth not appear on what it was founded,

founded, the verdict cannot be produced in corroboration of the evidence on the action.

It is true, this doth in part take off the force of such evidence; Answer. for, as when a verdict is produced in evidence, it may be answered, that it did not arise from the merits of the cause, but from some formal defect of the proof, and that makes it no evidence, toward gaining the point in question; so a verdict may be diminished in point of authority, by shewing that it was in part founded on the oath of the party interested in the action; and the jury are to respect it no further than as they presume it given, and supported by the credit of other testimony that are not concerned in the cause.

Yet others have said the verdict given on the indictment cannot be given in evidence, because on that prosecution there is no liberty left to the party to attaint the jury, as he hath power to do, if injured on a civil action; therefore *quære*.

A verdict in a criminal case, where the matter was capital, was denied to be given in evidence in a civil case; as where the father was acquitted on an indictment, for having two wives, this could not be given in evidence, in a civil case, where the validity of the second marriage was controverted: the reason seems to be, because much less evidence is necessary to maintain the action, than to attaint the criminal, and therefore his acquittal was no argument that the fact was not true.

If a verdict be given against the defendant on the same point, Trin. Ass. though another party were plaintiff, yet in some cases it may be 1701. given in evidence; as if there be a trial of title between *A.* lessee of *E.* and *B.*, and afterwards there be a trial of the same title between *C.* lessee of *E.* and *B.*; *C.* may give the verdict found against *B.* in evidence upon the trial between him and *B.*, for this was the sense of a former jury on the fact. In which trial *B.* had the liberty to cross-examine, though the same fact had been already decided against *B.*

If there be several objections brought against several persons, though for lands under the same title, and there be a verdict against one, that verdict cannot be given in evidence against the rest, for it is the party against whom the verdict is given that can have relief by attaint, inasmuch as the residue are not prejudiced; and these parties shall not be injured by a verdict they had not the power to controvert.

Rep. 2. Stra. 1151. See Carth. 79. 181. 5 Mod. 386. 2 Jones, 221. 2 Mod. 142. L. E. 91. pl. 23.

If a man has two wives, and be thereof convicted, and dies, and the second wife claims dower, the verdict and conviction cannot be given in evidence, but in this case the writ must go to the bishop; for whether the marriage be lawful or not, is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law.

11 Mod. 224. 10 Mod. 386. 8 Mod. 181. Gilb. Rep. 256., &c. Fitzgib. 164. 175. 276. &c. 204., &c. Stra. 79. 2 Stra. 960, 961.

But the verdict may be made an exhibit in the cause before the bishop to induce him to believe there was a former marriage.

Ca. temp.
Hardw.
312.

The record of a conviction in a civil cause, cannot be given in evidence in a criminal prosecution.

Lord How-
ard and
Lady Inchi-
quin, 1700.
Hard. 472.

But this rule of giving verdicts in evidence on the same point, is to be taken with great restriction; for no body can take benefit by a verdict that had not been prejudiced by it, had it gone contrary; and therefore if a termor for years had recovered against *B.* the reversioner might give such verdict in evidence, for *B.* has no prejudice, because he hath the liberty to cross-examine the witnesses, and to attain the jury, and it is fit the reversioner should make use of the verdict, and have benefit by it, since he had been dispossessed by the verdict, if it had gone against the termor, and therefore he may offer it in evidence. So, if there were tenant for life, the reversion in fee, and *B.* bring his action in ejectment against the tenant for life, and a verdict be given against the plaintiff, it seems that the reversioner might have given this in evidence against *B.*, because he would have been prejudiced in case *B.* had recovered, for his reversion would have been turned to a naked right in him. *Quare, et vide infra.*

Hard. 472.

But a person that hath no prejudice by the verdict can never give it in evidence, though his title turns upon the same point, because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant, and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit; for it would be unequal, that since the cause is a new matter between the parties, the jury should be swayed by any prejudice; for the letting in of prejudgments, supposes that the cause has been already decided, and that it is not tried and debated as a new matter, but as the effect of some litigiousness in the defendant that holds out the possession, when the cause has been decided against him, and this prejudice ought not to be thrown upon him on a new inquiry.

Ibid.

Rushworth,
Viscountess
of Pembroke
and Courier.
L. E. 108.
pl. 622.

As if *A.* prefers a bill against *B.*, and *B.* exhibits his bill, in relation to the same matter against *A.* and *C.*, and a trial at law is directed, *C.* cannot give in evidence the depositions in the cause between *A.* and *B.*, but it must be tried entirely *ut res nova*.

A. lessee of *B.* brings an ejectment against *D.* and the verdict goes for the defendant; this may at any time be given in evidence against *B.*, for the possession of *B.*'s lessee is his own possession, inasmuch as the lessee *tenet in nomine alieno*, and *B.* might in this case give any thing in evidence, as well as the plaintiff himself, and challenges might have been made to the jury for consanguinity to *B.* the reversioner: now then since *A.* hath the possession of *B.* as his bailiff, if there be a verdict against that possession, it must conclude *B.*, since he hath in this case, all liberty to cross-examine

examine as well as *A.* himself, and by consequence, this verdict must be evidence against any other lessee of *B.*

But if there be a recovery against tenant for life, by verdict, this is no evidence against the reversioner, for the tenant for life is seised in his own right, and the possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no aid was prayed, for he had no permission to interest himself in the controversy.

If a verdict were given against *J. S.*, and then judgment were arrested, and then *J. S.* alien to *J. N.*, it seems that the verdict given against *J. S.* may be given in evidence against *J. N.*, for the alienation of *J. S.* cannot put *J. N.* in a better condition than *J. S.* was, for the substitute of *J. S.* can but succeed into his place, and at the time of the alienation the verdict might have been given in evidence against *J. S.*, and *J. S.* cannot by alienation destroy the advantage that his adversary ought to derive from the verdict; for though *J. N.* had not the liberty to cross-examine upon his title, yet *J. S.* had, and *J. N.* has but his title, and therefore cannot be supposed to make the fact better on the examination.

On an ancient verdict in prohibition, where the custom of tithing is set out, whether it might be given in evidence against another parishioner that was not party to the verdict, nor had the lands in question, was doubted; but by the better opinion it might be given in evidence, because it could not be supposed to have been a contrivance to alter the custom, it appearing to be ancient, and because there can be no other proofs but of this sort of what was then thought to be the custom.

The exception of its being *res inter alios acta* is not allowed against verdicts in case of customs and tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them. And it is not material in this case whether such verdicts be recent or ancient.

A commission under the seal of the Exchequer, and the inquisition taken thereupon, is admissible, though not conclusive evidence; and so are depositions taken thereon, though the parties in the cause had no notice of it, nor any opportunity of defending it.

Where the fact to be proved is such, whereof hearsay and reputation are evidence, a special verdict between other parties stating a pedigree would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, &c. are allowed. And of this opinion was Mr. Justice *Wright* in the Duke of *Atbol's* case; which opinion is generally approved, though the determination by the rest of the court was contrary; perhaps founding themselves on the case of *Sir William Clarges*

Hard. 426.
per Glynn.

2 Roll.
Abr. 680.
3 Mod. 142.
Ante, 33.

Per opini. J.
Dod. in the
case of the
Vicar of
Rolvend.

Bull. N. P.
233.
Carth. 181.

Tooke v.
Duke of
Beaufort,
1 Burr. 146.

Bull. N. P.
233.

2 Str. 1151.

Ca. K. B. *Clarges and Sherwin*, where, in a trial at bar, the only question was on the legitimacy of the Duke of *Albemarle*, and the court would not suffer a former verdict between other parties concerning other land depending upon the same question and title to be read in evidence. But there, it did not appear, either from the issue or verdict, that the same question was inquired into or determined. Besides, the giving a verdict in evidence to prove a particular fact, viz. that *John* had a son *Thomas*, is very different from giving it in evidence to shew the opinion of a former jury, which is only their deduction from a variety of facts proved to them.

Bull. N. P. 243. A verdict, with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, may be given in evidence in an action brought by the owner against the carrier for the same goods, for it is a strong proof against him that he had the plaintiff's goods.

Id. 234. But a verdict will not be admitted in evidence without likewise producing a copy of the judgment founded upon it, because it may happen that the judgment was arrested, or a new trial granted. This rule, however, does not hold in the case of a verdict on an issue directed out of Chancery, because it is not usual to enter up judgment in such case; and the decree of the court of Chancery is equally proof, that the verdict was satisfactory and conclusive.

2 Roll. Abr. 679. pl. 10. In an information by the attorney general for the king, when the jury are ready to give a verdict, the attorney general may withdraw a juror, for this is part of the prerogative, and is in room of the nonsuit of the subject, for the king cannot be nonsuited, being always in court, and this prerogative is derived out of a general reason of the king's employment for the publick safety; and therefore if he hath failed in any point of proof, so that disadvantage may be expected from the verdict, it shall be at his election, whether he shall receive his verdict or not, and therefore in a second information, none of the first jury shall be admitted to give in evidence, that they were agreed in their verdict, for such evidence would be of the same weight, as if the verdict had been given, and thereby the king would be dispossessed of the benefit of his prerogative.

2 Roll. Abr. 680. But if the king aliens the estate on which the trial was had, so that it comes into private hands, there on a second trial between private persons, the agreement of the jury may be given in evidence, for the prerogative is annexed to the crown, and cannot extend to any private person, and therefore they take the estate with the disadvantage of having a verdict against them.

2 Roll. Abr. 679. a. 3. But then on such trial they must have the record of the proceedings, on the first information, because as a verdict cannot be given in evidence, without the record, which gave authority to the jury to proceed, no more can they give in evidence the agreement of the jury without the record on which they were impannelled.

But a verdict cannot be thus avoided in criminal cases: for there the party must consent to the withdrawing of a juror; since he

he is in character and estimation so highly interested, and hath a right, if he so prefer, to entitle himself to a solemn acquittal by his peers.

As to writs, when a writ out of court is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record, and therefore the copy of it is not required; but where a writ itself is the gift of the action, you must have a copy from the record, inasmuch as you are to have the uttermost evidence the nature of the thing is capable of, and it cannot become the gift of the action till it is returned.

In an action of trespass against a bailiff for taking goods in execution, if it be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *fiery facias* without shewing a copy of the judgment. But if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution (or sale) that was fraudulent, there, the officer must produce not only the writ, but a copy of the judgment. For in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass: but in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 *Eliz.* for which purpose it is necessary to shew a judgment.

In *plene administravit*, the execution executed cannot be given in evidence, without the judgment, because there appears to be no authority for such execution without the judgment; for where the execution is of record, and the authority for such execution is also of record, they must both appear to the jury, otherwise they have not the uttermost evidence of the fact in question.

In an action brought by an attorney for his fees, it is sufficient to prove the taking out the writ by a warrant made by the coroners, for the writ may not be returned of record, and by consequence is no record, and then the warrant made by the coroners is sufficient to prove a title to his fees, for the attorney in this case is entitled to his fees, whether the writ be returned or not.

Among the records of the kingdom are to be ranked the journals of the House of Lords. And a copy of the minute book of the House of Lords may be given in evidence; for as Lord *Mansfield* said, "The minutes of the judgment are the solemn judgment itself;" not a word is added upon the journals, and a copy of them may certainly be read in evidence, for the inconvenience would be endless if the journals were to be carried all over the kingdom. Formerly a doubt was entertained whether the minutes of the House of Commons were admissible; because it is not a court of record; but that doubt seems now to be done away: and those of the House of Lords have always been admitted even in criminal cases.

The things that stand second in point of probability are all publick matters that are not of record.

Tri. per
Pais, 167.

1 Ld. Raym.
733.

5 Burr.
2631. S. P.
Dougl. 41.
S. P.
2 Bl. Rep.
1104. S. P.

Guildhall,
per Holt.
Tri. per
Pais, 227.

Silby and
Hinckly,
Trin. Ass.
1701. per
Gold.

Jones v.
Randall,
Cowp. 174.

Dougl. 594.

The publick matters that are not of record all come under this general definition: they must be such matters as have an evidence in themselves, and do not expect an illustration from any other thing; such are the copies of court rolls, and transactions in Chancery, and the like; and the copies of such matters may be given in evidence, inasmuch as there is a plain and coherent proof; for the matters themselves are supposed to be self-evident, and by consequence, when a copy of them is produced upon oath, you have a full proof, because you have proved upon oath a matter which when produced would carry its own light with it, and, by consequence, would need no proof.

Objection. But here it will be objected, that this is not the utmost evidence that the nature of the thing is capable of, for these testimonies themselves must be better than the copies of them.

To this the answer is, that the copy upon oath is reckoned as an equivalent to the thing itself; and the testimony itself must not be rigidly required, because since these matters lie for the publick satisfaction, every man has a right to their evidence, and in several places they cannot be at the same time, and therefore the things themselves cannot be demanded but only the copies of them.

The first sort of testimonies that are not of record are the proceedings of the court of Chancery on the *English* side.

Co. Lit.
260. a.

The reason why the proceedings in Chancery and the rolls of the court are not records is this, because they are not the precedents of justice; for the proceedings in Chancery are founded only on the circumstances of each private case, and they cannot be rules to any other; and the judgment there is *secundum equum & bonum*, and not *secundum leges & consuetudines*; and the reason why any record is of validity and authority is, because it is declarative of the sense of the law, and is a memorial of what is the law of the nation: now Chancery proceedings are no memorials of the laws of *England*, because the chancellor is not bound to proceed according to law.

But see 3 Bl.
Com. c. 27.

Now because these several proceedings before-mentioned are not records, they are by consequence, not such memorials as are lodged inseparably in any certain place, but are transferable from one place to another, and therefore may be themselves given in evidence.

Chan. Caf.
64, 65.
2 Sid. 221.
Eq. Abr.
227. pl. 1.
Nelf. Ch.
Rep. 102.

The bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; nor shall it be supposed to be preferred by the counsel or solicitor without the party's privity, and therefore is evidence as to the confession and admittance of the truth of any fact by the party himself; and if the counsel hath mingled in it what is not true, the party may have his action: but where a bill is exhibited, and there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party, for a man may file a bill in another's name to rob him of his evidence by a sham confession; and therefore a bill filed without any proceedings upon it has not the force of an evidence, for no man can suppose that the party did himself file the bill, for the bill, without any proceedings to bring

Chan. Caf.
64, 65.

bring the adversary to answer it, is of no use to the party, and therefore it must be supposed rather to be filed by a stranger to do him an injury. This is accounted to stand in point of credibility in the same circumstances, as a confession by letter under the party's own hand where no body saw the writing of it, though some have ranged it in an inferior degree, because the one is the party's own immediate confession, and the other is only the counsel's draught; yet it seems the allegation in a court of justice, that amounts to the confession of any fact, ought to have more weight and authority with it than any private owning.

But a mere general suggestion of facts, in order to a discovery, shall not be read in evidence; for this is no more than a surmise of the counsel, in order to come at facts: otherwise, of a fact stated in the bill on which the plaintiff founds his prayer for relief.

If a patron sues a simoniacal bond, and the parson prefers a bill in Chancery to be relieved, the bill and proceedings upon it shall be given in evidence on ejectment to make void the parson's living.

And if the bill be evidence against the complainant, much more is the answer against the defendant, and carries still a higher weight of probability along with it, because this is delivered in upon oath, and therefore over and above the single confession it has an authority from the sanction of an oath.

But when you read an answer, the confession must be all taken together, and you shall not take only what makes against him, and leave out what makes for him: for the answer is read as the sense of the party himself, and if it is to be taken in this manner, you must take it entire and unbroken.

An infant's answer by his guardian shall never be admitted in evidence against him on a trial at law, for the law has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath, for the authority the law gives to the guardian is for the infant's benefit, and not to his prejudice, and therefore the infant cannot be hurt by the guardian's oath.

see 3 Will. Rep. 238. Salk. 350. Vern. 60. 109, 110.

The answer of the trustee can in no case be admitted as evidence against the *cestuy que trust*.

A bill was brought by creditors against an executor, to have an account of the personal estate, the executor sets forth by answer, that there was 1100 l. left by the testator in his hands, and that coming afterwards to make up his accounts with the testator, he gave bond for 1000 l., and the other 100 l. was given him as a gift for his trouble and pains taken in the testator's business, and there was no other evidence in the case, that the 1100 l. was deposited but merely by the executor's own oath; and it was argued that the answer, though it was put in issue, should be allowed, since there is the same rule of evidence in equity as at law; and therefore if a man was so honest as to charge himself when he might roundly have denied it, and no testimony could have appeared, he ought to find credit where he swears in his own discharge.

2 Sid. 221.
Keb. 780.
L. E. 105.
pl. 55.

Bull. N. P.
235.

Keb. 780.
2 Sid. 221.

Godb. 226.
L. E. 106.
pl. 57.

Brochman's
case, Trin.
Ass. 1701.
per Gold.
2 Vern. 194.
288.

5 Mod. 10. See Ch. Caf. 154.

2 Vent. 72.
3 Mod. 259.
Carth. 70.
3 Will. Rep.
237. L. E.
106. pl. 59.
Answer of a
feme covert,
see 3 Will. Rep. 238. Salk. 350. Vern. 60. 109, 110.

Bull. N. P.
237.

Anon.
Hil. Vint.
1707. per
Cooper.

But it was answered and resolved by the court, that when an answer was put in issue, what was confessed and admitted need not be proved, but it behoved the defendant to make out by proofs what was insisted upon by way of avoidance: but this was held under this distinction; where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there, he ought to prove the matter of his defence, because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him so far as to pass for truth, whatever he says in avoidance; but if it had been one fact, as if the defendant had said the testator had given him 100*l.* it ought to have been allowed unless disproved, because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it; but it was urged that here the probability was on the defendant's side, because he did not take a bond for this sum as for the residue, but the Chancellor said there was some presumption in that, but not enough to carry so large a sum without better attestation.

In an information for perjury, an answer may be given in evidence without any person to prove that the defendant swore it, for the identity may be proved by many things out of the answer itself: besides, the party is obliged to sign his answer; and the perjury may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof, that out of the answer itself evince the identity of the person.

Although an answer is good evidence against a defendant, yet it is not against his alienage: nor is it any evidence for the defendant in a court of law (except so ordered on an issue out of Chancery) unless the plaintiff make it evidence by producing it first. As, where on an issue out of Chancery to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the defendant. But where an answer in Chancery of the witness was produced to shew him incompetent, he having there sworn that he had an annuity out of the land in question, and Serjeant *Maynard* insisted to have the answer read through, the court refused it, as it was produced only to shew that he was not a competent witness in the cause, and not to prove the issue.

Analogous to this is a man's own voluntary affidavit, which may also be given in evidence against him.

But there is a very great difference between the evidence of an answer, and that of a voluntary affidavit.

An answer cannot be given in evidence without producing the bill, because without the bill there does not appear to be a cause depending. But if there be proof by the proper officer that the bill

has

has been searched for diligently in the office, and cannot be found, there, the answer hath been allowed to be read without a sight of the bill; and this Lord Chancellor *Broderick* allowed, though the loss of the bill was not proved by the proper officer, but by the clerk only who wrote in the office, and swore he searched carefully with the officer and could not find the bill.

& Rix, Ad-
ministrators
of Howard
& al.

An answer is proved by shewing the allegations in the court, viz. by shewing the bill which is the charge, and the answer which is as it were the defence to the bill; and this in civil cases shall be intended to be sworn, because the proceedings upon such defence are upon oath. And since the proceedings of any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this case are upon oath, it follows of consequence, that in all civil cases the answer is to be taken as an oath, without any further proof but from the proceedings in the cause.

Hil. Ass.
1700.

But a voluntary affidavit is not part of any cause in a court of justice, and therefore it must be proved to be sworn; for if you only prove it signed by the party, the proof goes no farther than to suppose it as a note or letter, and as such you may not give it in evidence without more proof, for a note or letter is a bare acknowledgment under the hand of the party, and this is no more unless you prove it to be sworn also, for it cannot be presumed to be sworn, being not filed as an oath in a court of justice.

Vern. 53.
413. Ld.
Raym. 311.
734.
2 Ld. Raym.
893. 936.
2 Vern. 471.
547. 555.
561. 603.
Ch. Pra. 59.
116. 212.

3 Mod. 36. 9 Mod. 66. 11 Mod. 210. 262. 12 Mod. 136. 231. 305. 310. 319. 339. 342. 375.
394. 414. 494. 500. 521. 555. 565. 579. 607. L. E. 121. pl. 92.

Such are the affidavits made before a Master in Chancery by the vendor of the estate, in satisfaction of the purchaser, that the estate is free from all charges and incumbrances.

In an action of covenant brought against two, the affidavit of one of them was given in evidence as an acknowledgment of them both, because the acknowledgment of one of them where they had a joint interest was to be looked upon as a truth relating to them both, and the consideration of the matter is to be left to the jury how far it is evidence against the other.

Vicary's
case in the
Exch.

The second difference between them is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; the reason is, because the answer is an allegation in a court of judicature, and being matter of publick credit, the copies of it may be given in evidence for the reason formerly mentioned. But a voluntary affidavit hath no relation to any court of justice, and therefore is not entitled to publick credit, and being a private matter, the affidavit itself must be produced as the best evidence. Besides, it must be proved to be sworn, which it cannot be unless it be produced. Therefore, where in an action for a malicious prosecution, the plaintiff to increase damages offered the office copy of an affidavit made by the defendant in Chancery of his being worth 2,500*l.*; Lord *Raymond* refused to let it be read, and the plaintiff was obliged to send for the original which was filed in Chancery. And notwithstanding the office

3 Mod. 116.
ante, 54.

Bull. N. P.
238. 9.
Chambers v.
Robinson,
Tr. 12 G. 2.

copy

copy of an answer may be given in evidence in a civil suit, yet it will not be sufficient on an indictment for perjury, though perhaps such copy would be sufficient for the grand jury to find the bill; but upon the trial the original must be produced, and positive proof made that the defendant was sworn by a witness acquainted with him. But proof that a person calling himself J. S. was sworn, and that he signed the answer (or affidavit), and proof also by another witness of the hand-writing, would be sufficient. So, an answer being brought out of the proper office, and *jurat* under the master's hand, and proof of its being signed by the defendant by proof of his hand-writing, is sufficient to prove it sworn by him even on an indictment for perjury. But no return of commissioners (or of a Master in Chancery) of the party's swearing will be sufficient, without some other proof of the identity of the person. But the voluntary affidavit of a stranger can by no means be given in evidence, because the opposite party had not the liberty to cross-examine.

3 Mod. 116.

2 Burr.
1189.

3 Mod. 117.

Style, 446.

The next thing is the depositions; and here we must in the first place consider what rank they stand in, in point of credibility. To enlighten this matter we must give an account of their original use. They evidently came over to us from the civil law. It is very plain that the parties exhibited their interrogatories upon their several allegations, but that the witnesses were privately examined upon these interrogatories by the same judge that tried the cause; so that the course anciently among the *Romans* is very different from the modern pleadings of the Chancery, where the sense of the witness is stated by the examiner, on which the Chancellor is to judge.

Dig. lib. 22.
tit. 5. § 3.
de Test.

That this which I have mentioned was the ancient course of the civil law, is very plain from *Adrian's* epistle to *Varus* the legate of *Cilicia*, *Tu magis scire potes quanta fides habenda sit testibus, qui & cujus dignitatis, & cujus estimationis sint, & qui simpliciter visi sint dicere, utrum unum eundemque mediatum sermonem attulerint, an ad ea quæ interrogaveras, ex tempore verisimilia responderint.*

Now these examinations were first made privately, that the judge might in the first place be possessed of the naked fact, and the sense of these witnesses was after taken in writing, and then publication passed, that the judges might have all due assistance from the observation of the advocate, if he had not sufficiently compared and weighed the examination. As the trials of the civil law thus stood when the judges viewed the behaviour of the witnesses, there is very little difference between this trial and that of the jury, save only that this sort of trial by jury is much more speedy, and the evidence is more entire, whilst in the other way the judges take up the evidence at one time and the gloss at the other, and such breaking of the evidence may be dangerous to a weak and less considering judge: besides, the judge not being of the neighbourhood cannot so easily distinguish the credit of the witnesses, and upon this account also the trial by jury is preferable to the examination of the civil law when under the best regulation.

And

And, no doubt, in our Chancery proceedings the witnesses were formerly examined by the masters, who sat in the court to inform the Chancellor of their credibility, till causes so multiplied, that the masters were employed in other affairs, and so the examination of witnesses was left to the examiners.

Now, since this practice has been used, no doubt, but that the credit of depositions *ceteris paribus* falls much below the credibility of a present examination *viva voce*, for the examiners and commissioners in such cases often dress up secret examinations, and give a quite different air to them from what they would have, if the same testimony had been plainly delivered under the strict and open examination of the judge at the assizes.

But though the depositions fall short of examinations *viva voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer sworn to that purpose from the very mouth of the witness, is of more credit than what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues constantly the same; so that we cannot be certain on a verbal attestation, but that some circumstances of the fact may be lost in the recollection. We must in the next place see in what cases depositions may be read.

1st, They may be read where the witnesses are dead, for where the witness is living, they are not the best evidence the nature of the thing is capable of, and therefore cannot be read, but where the witness is dead, the deposition is allowable: for as records are the invention that perpetuate the decisions of law, so are depositions the only method to perpetuate the memory of the fact, and therefore they must be trusted where the witness is not in being.

S. C. Show. 363. 2 Salk. 555. 691. T. Raym. 170. See Hob. 112. 2 Ro. Rep. 679. Hardr. 232. 315. T. Raym. 335, 336. Lil. Abr. 388. 554. 5 Mod. 9. 163. 277.

Godb. 193.
326.
2 Stra. 920.
Barnard.
K. B. 348.
2 Bac. Abr.
305. Gilb.
Chan. 140.
Salk. 278.
281. 286.
4 Mod. 146.

2dly, Where a witness is sought and cannot be found, you may, upon oath of the matter, use his depositions; for when it appears by oath that he cannot be found, it is the best evidence that possibly can be had of the matter; for when a witness is sought and cannot be found, he is in the same circumstances as to the party that is to use him, as if he were dead.

Godb. 326.
L. E. 106.
pl. 27.

3dly, If it be proved that a witness was suborned and fell sick by the way, his deposition may be allowed to be read, for in this case the deposition is the best evidence that possibly can be had, and that answers what the law requires.

Mod. 283.
284.
11 Mod.
210. 225.
226. 203.
Fitzgib. 197.

12 Mod. 215. 231. 305. 319. 339. 375. 403. 607. Will. Rep. 288, 289. 414. 415. 557. 2 Will. Rep. 463. Ld. Raym. 729. 730. 734. 735. 2 Ld. Raym. 873. 1166. 1371. Vern. 331. 413. Pre. Ch. 64. Eq. Abr. 227. 2 Stra. 920. L. E. 180. pl. 13.

But depositions taken thirty years since were admitted to be read in Chancery, though the parties were not the same, inasmuch as the cause related to the same land, and the tenants were parties to it, and those witnesses were since dead, the plaintiff's title then

Chan. Cas.
73. Eq.
Abr. 227.
pl. 2.

not appearing. And this is an indulgence of the Chancery beyond the strict rules of the common law, and is admitted for the pure necessity, because evidence should not be lost: besides, Chancery hath great faith in its own examiners, who are supposed indifferent persons that by themselves take the sense of the parties strictly, so that by that means the depositions stand the fairer to be read at any time. *Quere.*

Hard. 472.

4thly, A deposition cannot be given in evidence against any person that was not party to the suit, and the reason is, because he had not liberty to cross-examine the witnesses, and it is against natural justice that a man should be concluded in a cause to which he never was a party.

Ibid.

But in cases of customs and tolls, and, in general, in all cases where hearsay and reputation are evidence, depositions, under these circumstances, may be given in evidence.

5thly, A man shall never take advantage of a deposition that was not party to the suit; for if he cannot be prejudiced by the deposition, he shall never receive any advantage from it, for this would create the greatest mischief that could be; for then a man that never was party to the Chancery proceedings, might use against his adversary all the depositions that made against him, and he in his own advantage could not use the depositions that made for him, because the other party not being concerned in the suit had not the liberty to cross-examine, and therefore cannot be encountered with any depositions out of the cause.

Raym. 535.
L. E. 114.
pl. 76.

6thly, Depositions before an answer put in are not admitted to be read, unless the defendant appears to be in contempt, for if a cause do not appear to be depending, then, are the depositions considered as voluntary affidavits; for unless a suit is shewn to be commenced, it doth not appear that the adverse party had liberty to cross-examine: but if the adverse party be in contempt, then the depositions of the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join the examination of the witnesses.

Ch. Caf.
175. Ld.
Raym. 735.
Backhouse
and Middleton.

When the bill is dismissed, the rule as to the reading of the depositions is this: where the bill is dismissed because the matter is not proper for equity to decree, yet the depositions on the fact in the cause may be read afterwards in a new cause between the same parties: for though the matter is not proper for equity to decree, yet there was a cause properly before the court; for it is proper for the jurisdiction of equity to consider how far the law ought to be relaxed and moderated; and where there is a cause properly before the court, for whomsoever that cause be decided, yet the depositions in that cause must be evidence, as well as in all others.

Ch. Caf.
175.

But if a cause in equity be dismissed, for the irregularity of the complaint, the depositions in that cause can never be read; as where a devisee, on a suit pending by his deviser, brings a bill of revivor, and several depositions are taken, and then the cause on the hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor; in this case, and in a new original bill exhibited, the devisee cannot use
the

the former depositions; for in the first cause, mistaking the bill that he ought to bring, there was no complaint before the court, since the court doth not allow any devisee to complain in that manner by right of representation, and there being no cause regularly before the court, there could be no depositions in it.

In cross causes in equity, an agreement was proved in one of the causes, and in that cause it was not set forth in the allegations of the bill or answer: in the other cause the agreement was set forth in the bill, and not proved in the cause; and an order was obtained before publication, that the same depositions should be read in both causes: and by the better opinion this might be, but since the order was before publication in the second cause, the defendant had liberty to cross-examine the witnesses on which particulars he pleased, and the sight of the depositions was to his advantage. *Ibid.* 236.

If a witness, after his deposition taken, become interested, his deposition shall not be read; for the intent of taking such deposition is only to perpetuate his testimony in case the witness die. *1 Salk. 286.*

If a witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power to cross-examine him, and the rule of the common law is strict to this, that no evidence shall be admitted, but what is or might be under the examination of both parties. *Hard. 315. 2 Jon. 164. Will. Rep. 414, 415. 2 Will. Rep. 563. L. E. 111. pl. 72.*

But in such cases as these, the way is to move the court of Chancery, that such a witness's depositions should be read, and if the court see cause, they will order it, and this order will bind the parties, to assent to the reading of such depositions, though it doth not bind the court of *nisi prius*: and this is thought just, because the witnesses are examined by the officers of the court, who are supposed to favour neither party. *2 Jon. 164. L. E. 113. pl. 74.*

Formerly, they did not enrol their bill and answer, but as it seems the bill was left loose in the office with the clerks of the office, and was thereby subject to be lost; and therefore ancient depositions may be given in evidence without the bill and answer. So, depositions taken by the command of Queen *Elizabeth*, upon petition, without bill and answer, were, upon a solemn hearing in Chancery, allowed to be read. *2 Keb. 31. L. E. 113. pl. 75. Hob. 112.*

The ancient practice was also, that they never published the depositions in the lifetime of the witnesses, because the depositions *in perpetuam rei memoriam* were of no use till after the death of the witnesses; but this practice was found very inconvenient, because witnesses became thereby secure in swearing whatsoever they pleased, inasmuch as they could never be prosecuted for perjury, the effect of their oaths not being known till after their deaths. *Practice of Chan. 7.*

On an information for perjury, the depositions in Chancery signed by the commissioners are not sufficient evidence, without proof, that the party swore them; for there is no proof of the *3 Mod. 116. 117.*

identity of the person, but by the comparison of hands, which is not a sufficient evidence in a criminal case (*a*), for another man might personate me, and thereby subject me to the penalty of perjury.

From what has been said, it is evident, that a voluntary affidavit before a master in Chancery is no evidence between strangers, because here is no cross-examination, since there appears to be no cause depending; and therefore such evidence cannot be admitted, except in those cases where a confession of the person making the affidavit would be evidence, as, where a widow came for administration, the marriage being contested, an affidavit of the man himself was read. So, on an issue directed out of Chancery to try the legitimacy of the plaintiff, the father's oath before the judges on a private bill was allowed to be evidence.

As the spiritual courts are not of record, depositions taken in them cannot be read in evidence, though the witnesses be dead.

Styl. 446.
Sacheverel
and *Sache-*
verel,
5 Mar. 1716,
at Delegates.
May and
May, K. B.
at bar.

Bull. N. P.
242. 2 Roll.
Abr. 679.
Lit. Rep. 167.

1 Lev. 180.
Sir T. Jones,
53.
J. Anson
v. Wilson,
Doug. 244.
Bowles
v. Lang-
worthy,
5 Term
Rep. 366.

Depositions taken before commissioners of bankrupts cannot be read in evidence, because there cannot be a cross-examination. However, by the statute 5 G. 2. c. 30. § 41. which directs proceedings on commissions of bankrupt and the certificates to be entered of record, true copies signed and attested as therein required are to be given in evidence. Therefore an office copy of the deposition of the witness who swore to the act of bankruptcy was admitted after the witness's death, to be evidence to prove the precise time when the act of bankruptcy was committed. And where an examinant produces a deed before the commissioners, under which he claims a title to the bankrupt's goods, the examination may be used afterwards in a question between him and the assignees as evidence against him to prove the execution of the deed, without calling the subscribing witness.

If witnesses examined on a coroner's inquest be dead, or beyond sea, their depositions may be read; for the coroner is an officer appointed on behalf of the publick, to make inquiry about the matters within his jurisdiction; and therefore the law will presume the depositions before him to be fairly and impartially taken. And by 1 P. & M. c. 13. and P. & M. c. 10. justices of the peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and those examinations shall be read against the offender upon an indictment, if the witnesses be dead. However, if the offender be not present at the time when the witnesses are examined against him, the examinations cannot be received in evidence.

Woodcock's
case,
Leach's
Cates, 397.
12 Mod.
318. See
Sira. 162.
Barnard.
K. B. 243.

Another way of perpetuating the testimony of a person deceased is by giving the verdict in evidence, and the oath of the party deceased. Where you give in evidence any matter sworn at a former trial, it must be between the same parties, because other-

wife.

wife you dispossess your adversary of the liberty to cross-examine: besides, otherwise you cannot regularly give the verdict in evidence, and where you cannot give the verdict in evidence, you cannot give the oath on which it was founded, for if you cannot shew there was such a cause, you cannot shew that any person was examined in that cause, and without shewing there was a cause, no man's oath can be given in evidence, inasmuch as it appears to be merely a voluntary affidavit.

What a man himself that is living has sworn at one trial, can never be given in evidence at another trial to support him; though what the witness has said in discourse may be given in evidence to support him; because the same oath at another trial is no evidence of the truth of any man's swearing; for if a man be of that ill mind to swear falsely at one trial, he may do the same on the other on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him: but if a man hath sworn at one trial different from what he hath at another, this is good evidence as to his discredit.

A witness was sworn in a trial at bar in *C. B.* between the same parties on the same issue, and he was subpoenaed by the defendant to appear at a second trial in *K. B.* and his charges were given him; but he not appearing, persons were admitted to give evidence of what he swore in *C. B.*, for the court said, they would presume he was kept away by the plaintiff's practice. This presumption was strengthened by his having been produced by the plaintiff at the former trial.

On an appeal of murder, the appellant cannot give in evidence the indictment, and what a person deceased swore at the trial; for in this case we have already shewn that the indictment cannot be given in evidence against the defendant, and, by consequence, the oath cannot be given in evidence on the indictment: besides, the appeal is tried as a new cause, and therefore it is necessary to have his accusers face to face.

If the indictment be given in evidence for the prisoner, and the oath of a person deceased, the account of that oath must be upon oath; for nothing can be given in evidence as an oath but upon oath.

A decree in Chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction, to be a full proof, for that were to suppose they were incompetent judges, where they had jurisdiction.

126. Vern. 53. 413. 2 Vern. 471. 591. 547. 555. 603. Fitzgib. 157. Ld. Raym. 734. 893. 936. Will. Rep. 414. 415. 8 Mod. 75. 181. 322. 9 Mod. 66. 11 Mod. 210 to 212. Gilb. Eq. Rep. 2. 203. &c. 12 Mod. 24. 85. 136. 215. 231. 305. 310. 319. 339. 342. 345. 375. 394. 414. 494. 500. 521. 555. 565. 579. 607. Stra. 95. 162. 308. See Barnard, K. B. 245. 2 Stra. 960. 1151. 1242. 2 Roll. Abr. 679. L. E. 125. pl. 101.

12 Mod. 318.
4 St. Tri. 265 to 272.
2 Hawk. P. C. 430.
§ 9. 12.
2 Keb. 384.

Green v. Gatewick, Mich. 24 Car. 2. Bull. N. P. 243.

2 Sid. 325.
2 Hawk. P. C. 430.
§ 8. L. E. 51. pl. 66.
2 Roll. Rep. 460. 461.
See 2 Keb. 384.

Sid. 325.
L. E. 31. pl. 66.

2 Mod. 231.
2 Str. 960.
961. Eq. Abr. 227.
&c. Ch. Pre. 59. 64.
116. 212.
10 Mod. 42.
45. 44. 74.
108. 109.

1 Keb. 31.

So, a decretal order in paper with proof of the bill and answer, or without such proof (if they are recited in the order) may be read.

Bull. N. P.

244.

Ambi. 756.

Wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter; and in the case the determination be final in the court of which it is a decree, sentence, or judgment, such decree, sentence, or judgment will be conclusive in any other court having concurrent jurisdiction. But here the following distinctions must be attended to.—The judgment of a court of concurrent jurisdiction *directly upon the point*, is as a plea, a bar, or as evidence conclusive *between the same parties, upon the same matter directly in point* in another court. And the judgment of a court of exclusive jurisdiction *directly on the point* is in like manner conclusive *upon the same matter, between the same parties coming incidentally in question* in another court for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Per De

Grey, C. J.

11 St. Tr.

261. Carth.

225. Lane

v. Degberg,

H. 11 W.

3. Bull.

N. P. 244.

2 Show. 232.

Carth. 32.

Cowp. 315.

Bull. N. P.

244, 5.

3 Salk 290.

2 Show. 6.

As to the proceedings in the spiritual court, these are in cases matrimonial and testamentary, and all other ecclesiastical causes. How these courts gained the jurisdiction in causes testamentary, which was originally of temporal consueance, is not here to be considered further than is necessary to determine the weight of credibility that is to be given to their sentences. The way of authenticating testaments by the civil law was this: The testator and his witnesses subscribed the will, bound it up and sealed it with their seals: after the decease of the testator it was opened in the presence of the prætor, and he delivered copies of it, and kept the original in a public treasury; and hence it is, that the spiritual court keeps the original will, and gives out the probate, which is but a copy of the will under their seals.

But originally among the *Germans*, the goods as well as the feud itself belonged to the lord: afterwards it was thought fit that the feudary should dispose of them, and then the will was proved in the country courts before the alderman and bishop, and if any man died intestate, they were distributed among his kindred: but after the Conquest, the probate of the will and the commission of administration was indulged to the bishop, who never had it in the times of the empire, under pretence that the provision would be better made for the souls of the deceased. If the spiritual courts exceed their commission, they have plainly no authority, and therefore they must confine themselves to the bequest of the personal estate: for the feud was not devisable until the 32 H. 8. for reasons mentioned in another place.

Therefore, if a man devise lands by force of the statute of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence, for all their proceedings, so far as they relate to the lands, are plainly *coram non iudice*, for they have no power

Rpil. Abr.

678. Nor

will an ex-

-complicat-

-ion of the

power to authenticate any such devise, and therefore a copy produced under their seals is no evidence of a true copy.

will under the great seal be evidence always to be

dence of it: Comb. 45. in questions relative to lands devised, the original will ought to be produced.

But the probates of wills are good evidence as to the personal estate, and they are the records of that court, and therefore a copy of them under the seal of that court must be good evidence: and this is still the more reasonable, because it is the use of the court to preserve the original will, and only to give back to the party the copy of that will under the seal of the court.

Roll. Abr. 673.

4 Term Rep. 258.

The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted: therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. So, would the book of the ecclesiastical court, wherein was entered the order for granting administration. So, would the copy of the probate of the will be evidence of *J. S.* being executor, but a copy of the will would not be evidence of it.

Kempton v. Crofs, E. 3 G. 2. K. B. 1 Lev. 25.

Smartle v. Williams, Bull. N. P. 246.

Polhill and Polhill, Hil. 1701.

Where a person in ejectment would prove the relation of father and son by his father's will, he must have the original will, and not the probate only, for where the original is in being, the copy is no evidence, and the probate is no more than a true copy under the seal of the court of a private instrument, and the law which seeks the best evidence, will not allow of the copy only: besides, this is not proved to be a true copy, for the seal doth not prove the truth of the copy, unless the suit relate to the personal estate only.

But the ledger-book is evidence in such case, because these are not considered merely as copies, but they are the rolls of the court itself; and though the law doth not allow these rolls to prove a devise of lands where the claim is by the words of the devise, for the reasons already given, yet when the will is only to prove a relation, the rolls of the spiritual court, that have authority to enrol all wills, are sufficient proofs of such testament.

Polhill and Polhill, Hil. Aff. 1701. Under particular circumstances the ledger-book may be evidence

even in the devise of a real estate: as, where in an avowry for a rent-charge, the avowant could not produce the will under which he claimed, that belonging to the devisee of the land; but producing the ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged. Cas. K. B. 375.

But the copy of the ledger-book was not allowed to be read in this case, because common practice had prevailed that it should not; though my Lord *Holt* said that since the original would have been read as a roll of the court without further attestation, it was fit the copies should be read, and that the practice should be altered. And the practice seems to be founded on the mistake, that the ledger-book is read as a copy, and so the copy of that is but the copy of a copy, whereas the ledger-book is read as a roll of the Prerogative Court.

In a suit relating to a personal estate, the probate of the will under the seal of the court is sufficient evidence, and no evidence contrary to it can be given, that such will was not the last will

Raym. 404 to 406. 2 Sid. 359. Lev. 235.

2 Keb. 337. and testament of the party deceased, for the spiritual court are the proper judges of what is, and what is not the will of the testator ; and since the authority of judging is committed to them, the temporal courts are bound by their judgments.

262. Stra. 481. Will. Rep. 388. L. E. 125. pl. 103.

Raym. 404. But the adverse party may give in evidence, that the probate is forged, because such evidence supposeth that the spiritual court hath given no judgment, and so there is no reason for the temporal court to be concluded, since the spiritual court hath made no judgment in this matter, for a forged probate is none at all.

to 406. So, they may also give in evidence, that such probate was obtained by surprise, for that is as much as to say, that the spiritual court hath made no legal decision in the matter, and therefore that the temporal court ought not to be concluded by their authority.

2 Sid. 359. So, if letters of administration be shewed under seal, you may give in evidence, that they were revoked ; for this is in affirmance of the proceedings in the spiritual court, and doth not at all controvert the righteousness of their decisions.

Mod. 117. A will that hath partly the form of a will, and partly the form of a deed, may be given in evidence as a will, for if the intent of the party sufficiently appear to make a disposition after his decease, the informality of the words shall not vitiate it.

Vent. 257. Where a will remains in Chancery, by order of that court, a copy may be given in evidence, for then it becomes a roll of that court, and, by consequence, a copy of it is sufficient evidence. See more of wills after.

3 Keb. 310. The rolls of a court-baron are evidence, for they are the publick rolls, by which the inheritance of every tenant is preserved, and they are the rolls of the manor court, which was anciently a court of justice relating to all property within the district.

Sec. 2 Danv. A copy of a court-roll under the steward's hand is good evidence to prove the copyholder's estate.

Abt. 539. So, an examined copy of the court-roll is good evidence, if sworn to be a true one.

L. E. 89. pl. 18. If copyhold-rolls make mention of a surrender to the use of the tenant's last will, and then admit *A.* as devisee under the will, yet this is no evidence of the seisin or title of *A.* without the will itself, because the land doth not pass by the surrender without the will, and therefore the will must be shewn as the best evidence of *A.*'s possession and title.

Keb. 40. An entry in the court-rolls of a manor is admissible evidence of the mode of descent of lands in the manor, although no instances of any person having taken according to it be proved.

117. See A customary of a manor, which appeared to be of great antiquity, and had been delivered down with the court-rolls from steward to steward, was admitted to be good evidence to prove the course of descent within the manor, notwithstanding it was not signed by any one.

L. E. 276. The register of christenings, marriages, and burials is good evidence, or a copy of it. The register began in the 30 of *H.* 8.

pl. 106.

Ibid. 1700. Sid. 71. Godol. 145.

by

by the instigation of the Lord *Cromwell*, who at that time was vested with all the authority that the pope's legates formerly had, under the title of vicar general to the king, and all wills that were above the value of two hundred pounds, were to be proved in this court; and therefore it served his purpose to set on foot a registry of all persons that were christened and buried. And this might be very well appointed by the king's authority, as supreme head of the church, since christening and burying are ecclesiastical acts: and when a book was appointed by publick authority, it must be a publick evidence. This was afterwards confirmed by the injunction of *Edward 6.* and the particular manner of registering appointed; as that the registering should be in the presence of the parson and churchwardens on *Sunday*, and that the book should be kept locked in the church, to which the vicar and churchwardens should have keys.

Though it appear in evidence that the register was made from a day-book kept by the minister for that purpose, yet the day-book will not be admitted to contradict the entry in the register, e. g. to prove a child base-born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate.

On an indictment for entering a false marriage in the register book, the defendant was fined two hundred marks; for since the register is publick evidence, it must be guarded by the law, that it be not counterfeited.

c. 33. § 16. makes this a capital offence.

The pope's licence without the king's has been held good evidence of an impropriation, because anciently the pope was held to be supreme head of the church, and therefore was held to have a disposition of all spiritual benefices with the concurrence of the patron, without any leave of the prince of the country; and these ancient matters must be admitted according to the error of the times in which they were transacted. A pope's bull is no evidence on a general prescription to be discharged of tithes, because that shews the commencement of such a custom, and a general prescription shews that there was no time or memory of things to the contrary, so that the bull doth itself contradict such prescription.

But the pope's bull is evidence on a spiritual prescription, when you only lay the lands belonged to such a monastery as was discharged of tithe at the time of the dissolution, for then they continue discharged by act of parliament.

But the copy of the bull will not be allowed in evidence; the bull itself must be produced.

If the question be, whether a certain manor be ancient demesne or not, the trial shall be by *Domes-day* book, which shall be inspected by the court. Ancient demesnes are the socage tenures that were in the hands of *Edward the Confessor*, which *William the Conqueror*, in honour of him, endowed with several privileges: *Domes-day* book was a terrier or survey of the king's lands, which

was

Noy, 146.
Brownl.
207. 2 Roll.
Abr. 115.
pl. 11.
Cro. Eliz.
411.
Moore, 451.
Salk. 237.
12 Mod. 86.
L. E. 81.
pl. 2.
Godol. 164.

2 Str. 1073.

2 Str. 1073.

2 Sid. 71,
72.
The stat.
21 Geo. 2.

Palm. 427.
See L. E. 6.
pl. 20.

Palm. 38.

Palm. 38.

Brett v.
Ward,
Winch. 70.
Hob. 188.
Tri. per
Pais, 342.

was made in the time of the Conqueror, and which ascertains the particular manors which had this privilege.

Term. To know whether any thing be done in or out of the ports, P. sch. there lies in the *Exchequer* a particular survey of the king's ports, 1701. in which ascertains their extent. Scaccario.

An old terrier or survey of a manor, whether ecclesiastical or temporal, may be given in evidence, for there can be no other way of ascertaining old tenures or boundaries.

Bull. N. P. A terrier of glebe is not evidence for the parson, unless signed 248. by the churchwardens as well as the parson; nor even then if they be of his nomination: and though it be signed by them, yet it seems to deserve very little credit, unless it be likewise signed by the substantial inhabitants. But in all cases it is strong evidence against the parson.

1 Wilf. 170. A survey of religious houses taken in 1563, upon the dissolution of monasteries, was allowed to be good evidence to prove a vicar's right to small tithes.

Yates and Harris, Hil. Aff. 1702. An old map of lands was allowed to be evidence, where it came along with the writings and agreed with the boundaries adjusted in an ancient purchase.]

Skin. 623. pl. 17. A public history or chronicle may be given in evidence to prove Salk. 281. a matter relating to the kingdom in (a) general, because the nature pl. 9. of the thing requires it.

(a) So, a year-book may be evidence to prove the course of the court. Salk. 281. pl. 9.—So, Speed's Chronicle was given in evidence to prove the death of Isabel, Queen Dowager to E. 2. Skin. 15.

Salk. 281. pl. 9. But these will not be admitted as evidence to prove a particular Stainer v. right; and therefore where the question was, Whether, by the Burgessees of custom of *Droitwich*, salt-pits could be sunk in any part of the Droitwich. town, or in a certain place only? and on a trial at bar, *Camden's Britannia* was offered in evidence, it was refused. Skin. 623. pl. 17.

S. C. so ruled.

But for this But the books of heralds are admitted as evidence to prove pedigree, because the nature of the thing will not admit of better 2 Roll. evidence; also, this is their proper business, and about which they Abr. 686. are conversant, and therefore deserve the more credit. Yelv. 34. 2 Jon. 164.

224. Salk. 281. pl. 9. Comb. 63. and Skin. 623. pl. 17. where it is said, that, from the negligent manner of keeping them, they deserve but little credit*.——* This is certainly true, yet there are exceptions, as a visitation made by heralds, entered in their books, and kept in their office, has been admitted evidence of a pedigree. Pitton v. Walter, H. 5 G. Stra. 162.—So, the minute-book of a former visitation, signed by the heads of the several families, and found in a private library (Lord Oxford's). *Ibid.*

Cro. Eliz. 227. Leon. 242. S. C. An (b) almanack is sufficient evidence to prove a day *Sunday*, and S. P. Sid. 300. 6 Mod. 41. S. P. (b) That the almanack to go by is that annexed to the Common Prayer-book. 6 Mod. 81.

Raym. 84. Herbert and Tuckal. So, an almanack, in which the father wrote the nativity of his son, was admitted and allowed to be strong evidence at a trial at bar, to prove the nonage of the son.

[So,

[So, an entry in a father's family bible, an inscription on a tomb-stone, a pedigree hung up in the family mansion, are evidence in questions of pedigree.

The register of the Navy-Office, with proof of the method there used to return all persons dead, with the mark *De*. is sufficient evidence of a death.] *Ex dim.* Whitcomb, P. 6 Ann. C. B. B. N. P. 249.

So, books belonging to a publick company are good evidence; and therefore a party concerned in interest may, on motion, have copies of them to be made use of as evidence; for, being transactions of a publick nature, the publick is concerned in them. 7 Mod. 129. Ld. Raym. 744. Geery and Hopkins, on a motion

for copies of the books of the East India Company, *Ex dim.* 5 Mod. 395. Ld. Raym. 337. [It is essential in motions of this kind, that the party applying should be concerned in interest. He must therefore be a member of the company, or tenant of the manor, the books of which he applies to inspect. *Hodges v. Atkins*, 3 Willf. 398. 2 Bl. Rep. 877. S. C. Mayor, &c. of Exeter v. Coleman, Barnes, 228. Anon. 2 Vez. 620. *Shelling v. Farmer*, 1 Str. 646. *Murray v. Thornhill*, 2 Str. 717. *Rex v. Dr. Bridgman*, *Id.* 1203. *Allan v. Tap*, 2 Bl. Rep. 850. *Bishop of Hereford v. Duke of Bridgewater*, Bunb. 269. *Smith v. Davis*, 1 Willf. 104. *Smith v. Tillebois*, cited 3 Term Rep. 142. But in *Mayor of Lynn v. Denton*, 1 Term Rep. 689., *Corporation of Barnstaple v. Lathey*, 3 Term Rep. 303., and *Mayor, &c. of London v. Mayor, &c. of Lynn*, 1 H. Bl. 211., the courts seem to have over-ruled the cases of *Hodges v. Atkins*, 3 Willf. 398. and *Mayor, &c. of Exeter, &c. v. Coleman*, Barnes, 228., and to have holden, that in such actions as are brought to support claims of duties made by a corporation upon the publick, of the validity of which the best evidence must be in the documents of the corporation, and of which documents equity would grant an inspection; such, for instance, as claims of tolls; that, in these cases, individuals who are interested to dispute the claims have an interest in the books which will entitle them, upon motion, to an inspection of the entries relating to the subject-matter of the dispute.—Or, if the party applying be not a member, the books must be the common evidence of the transactions between him and the body in whose custody they are, so as to be for this purpose the books of both. Such are the cases of entries in the custom-house books, of the India Company, Bank stock, and transfer books. *Geery v. Hopkins*, 2 Ld. Raym. 851. *Wariner v. Giles*, 2 Str. 954. *Crew v. Saunders*, *Id.* 1005. But the courts will not grant these motions unless the evidence contained in the books be directly material in the cause, nor will they permit the party applying to inspect and copy any more than what relates to himself. *Benfon v. Port*, cited 1 Willf. 240. 1 Bl. Rep. 40. S. C. *Mayor, &c. of London v. Swinland*, 1 Barnard. 455. *Crew v. Saunders*, 2 Str. 1005. *Rex v. Fraternity of Hostmen, &c.* *Id.* 1223. Tenants of a manor seem to have a right to a general inspection of the court-rolls. *Rex v. Shelly*, 3 Term Rep. 141. How far corporators have such right with respect to the corporation-books seems doubtful. *Rex v. Babb*, 3 Term Rep. 581. Nor will the courts permit an inspection for the purpose of collecting evidence to support a criminal prosecution. *Rex v. Worfenham*, 1 Ld. Raym. 705. *Crew v. Saunders*, 2 Str. 1005. *Rex v. Cornelius*, *Id.* 1210. *Rex v. Mead*, 2 Ld. Raym. 627. *Rex v. Dr. Parnell*, 1 Willf. 329. 1 Bl. Rep. 37. S. C. *Rex v. Heydon*, 1 Bl. Rep. 351. *Roe v. Hanway*, 4 Burr. 2489.]

By the 7 *Jac.* 1. c. 12. reciting, That whereas divers men of trades and handicraftsmen, keeping shop-books, do demand debts of their customers upon their shop-books, long time after the same hath been due, and when, as they supposed the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered; and this of purpose to increase, by such undue means, the said debt; and whereas divers of the said tradesmen and handicraftsmen, having received all the just debt due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors, or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proofs, by writing or witnesses, of the said payment, that may countervail the credit of the said shop-

Although the statute says a shop-book shall not be evidence after the year, yet this does not make it evidence of itself within the year, without some circumstances. 2 Salk. 690. As in an action by a brewer, his manner of dealing was proved to

be, that the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen

shop-books, which few or none can do in any long time after the said payment; it is therefore enacted, "That no tradesman, or "handicraftsman keeping a shop-book as aforesaid, his or their "executors or administrators, shall be allowed, admitted, or "received to give his shop-book in evidence in any action "for any money due for wares hereafter to be delivered, "or for work hereafter to be done, above one year before the "same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done."

set their hands, and that the drayman, who had so set his hand, was dead; but that this was his hand which was set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more. Salk. 285. pl. 18. 2 Ld. Raym. 873. 6 Mod. 264. Price v. the Earl of Torrington.—So, in an *induiturus assumpti* on a taylor's bill, a shop-book was allowed for evidence, it being proved that the servant who wrote the book was dead, and that this was his hand, and he accustomed to make the entries therein. 2 Salk. 690. Pitman and Madox, ruled by Holt, C. J.—[But when the plaintiff to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand-writing; Lord C. J. Raymond would not allow it, saying, it differed from Lord Torrington's case, because, there, the witnesses saw the drayman sign the book every night. Clerk and Bedford, M. 5 G 2 Bull. N. P. 281.—Upon an issue out of Chancery to try whether eight parcels of Hudson's Bay Stock, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans, his assignees (the plaintiffs) shewed, first, that there was no entry in Mr. Lake's books relating to this transaction. Secondly, six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans. Thirdly, Jeremy Thomas was proved to be dead, and upon this the question was, Whether the book of Sir Stephen Evans referred to, in which was an entry of the payment of the money, should be read? And the court of K. B. at a trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir Biby Lake, the son of Mr. Lake.]

"Provided that this act shall not extend to any intercourse of "traffic, merchandizing, buying, selling, or other trading or "dealing for wares delivered, or to be delivered, money due, or "work done, or to be done, between merchant and merchant, "merchant and tradesman, or between tradesman and tradesman, "for any thing directly falling within the circuit or compass of "their mutual trades and merchandize; but that for such things "only they and every of them shall be in case as if this act had "never been made; any thing herein contained to the contrary "thereof notwithstanding."

Smartle v. Williams, Bull. N. P. 283. Comb. 249. S. C. 1 Ld. Raym. 745. Bary v. Bubington, 4 Term Rep. 514. Stead v. Heaton, Id. 669. 5 Term Rep. 123. In the case of Scarle

[Besides the case of shop-keepers' books, there are other cases where entries in private books or memorials are admitted in evidence to affect the rights of third persons, upon proof that the writer is dead, and that they are in his hand-writing. Any entry under such circumstances is admissible, when it is in restraint, not in advancement of the right of the party who made it; as where the party charges himself by the entry with the receipt of money, for the entry in this case derives its authority from the improbability that he would commit a falsehood to writing which must operate to his disadvantage. An entry again is admissible in those cases where hearsay evidence of the writer's declarations respecting the same fact would be received in evidence (a). And in the case

case of ecclesiastical dues, it is every day's practice to admit entries in the parson's books as evidence for his successor (*b*). v. Lord Barrington, 2 Str. 826.

the indorsement of the payment of interest made under the hand of the obligee within the twenty years from the date of the bond, was admitted as evidence in an action on the bond by the representative of the obligee to repel the presumption arising from length of time of its being satisfied. 2 Vez. 43. — (a) Lill Pr. Reg. 552. Woodnoth v. Lord Cobham, Bunb. 180. Glyn v. Bank of England, 2 Vez. 40. Outram v. Morewood, 5 Term Rep. 123. In a recent case in the Exchequer, the effect of this kind of evidence was very attentively considered. The plaintiff claimed the lands in question as part of old inclosures demised for ninety-nine years under a rent reserved to the lord of the manor, which term was alleged to be expired. In support of his title, he produced the rental of the family of fifty years date, which charged the steward with the receipt of such and such sums, and expressed that thirteen shillings and fourpence had been annually received for these premises by the name of inclosure on lease. The defendants contended, that the rentals were evidence only of the receipt of so much money, but were not admissible to prove in what right it was received, whether as a conventional or a quit-rent. And it was urged, that if they were admitted to that extent, a steward of a manor, by such insertions in his rentals, might convert all the quit-rents in the manor into conventional rents on terms for years, and might even express when such terms would expire, and so get all the freeholds into the possession of the lord. But the court, viz. Smythe, Chief Baron, Perrott, Eyre, and Burland, barons, said, fraud is not to be presumed; and the rentals are admissible not only to prove the receipt of the money, (which was agreed on all hands,) but also to shew in what right it was received. For otherwise the receipt of a gross sum of money proves nothing; it must be allowed to shew, that it was in respect of certain lands, which is evidence of tenure; and therefore it may shew the particular kind of tenure. The rentals in the hands of executors are evidence to charge or discharge them, which they could not do, unless they were allowed to shew the particular right in which the money was received. The steward, if living, would be a competent witness: as he is dead, this is the next best evidence, and therefore admissible. Harpur v. Brook, Tr. 14 G. 3. on a motion for a new trial. 3 Wooddes, 332. — (b) 2 Vez. 43. Bunb. 46.

If *A.* be seised of the manors of *B.* and *C.*, and during his seisin of both, he cause a survey to be taken of the manor of *B.*, and afterwards the manor of *B.* be conveyed to *E.*, and after a long time there be disputes between the lords of the manor of *B.* and *C.*, about their boundaries; this old survey may be given in evidence. *Secus*, if the two manors had not been in the hands of the same person at the time the survey was taken.] Bridgman v. Jennings, 1 Ld. Raym. 734.

On a contest in Chancery concerning a promise made by the Lord Abigney, to settle lands on the Lord Clifton and his lady, who was the daughter of the Lord Abigney; the king's certificate under his sign manual, signifying the purport of the said promise, was held sufficient evidence of it. Hob. 213. Lord Abigney v. Clifton, Godb. 199. S. P. but 2 Roll.

Abr. 686. seems contrary.

[With respect to deeds, the general rule is, that where any person claims by a deed in the pleadings, there, he ought to make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be shewn.

The deed consists of three things: 1st, Of sealing by the parties. 2dly, Of delivery to the party to whom the deed is made. 3dly, Of a right transferred, or obligation created.

1st, The seal was very ancient in the *Roman* and *Grecian* governments, and from them it came to the northern nations, who anciently passed all manner of right, by the actual tradition of the thing itself; the seal followed from the invention of coins, and is a derivation from the same convenience; for as coins were invented as tickets, to facilitate the exchange of all manner of commodities, so when coin was wanting, or not ready for payment, tickets were given by impresson in wax, and these passed instead of the coin itself, and these impressons were made with great distinction,

tion, for they contained the arms or some notorious symbol of the person contracting; now when such distinctions were taken up and found of use, they were at last required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no solemn contract without the distinction of the seal.

2dly, The delivery was always a solemn sign used by the northern nations, in the transferring of right, and as they anciently delivered the thing itself, and by that delivery made the alienation; so, when contracts took the place of the things themselves that were to be delivered, they annexed the solemnity to the contract, and the contract was completed by the delivery, and from thence it became necessary that a delivery should be made of all contracts.

3dly, In every contract there must be some right transferred, or obligation created, and therefore there must be apt words to shew what right was transferred, and to whom, to shew what obligation was created, and to whom: and the sense and signification of the words must be expounded by the law, since it is the province of the law to determine the forms and solemnities, and operation of all manner of contracts; for the operation and effect of a contract cannot be determined but by the rules of law that are appointed as the measures of transferring right, and of creating obligations; and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure.

There must therefore be a profert made of all solemn contracts in any action founded on such contracts,

1st, For the security of the subject, that what right is transferred, or what obligation is created, may be judged of according to the rules of law.

2dly, Because all allegations in a court of justice, must set forth the thing demanded: now the thing demanded cannot be set forth without the instrument shewn, upon which the demand arises, for since the demand is by the instrument, there can be no demand at all without shewing that from which it arises.

Co. Lit. 226. Therefore parties to a deed cannot found any claim without shewing a deed to the court.

Ibid. 267. Nor can privies in estate take any advantage of a deed without
10 Co. 92. shewing it.

Ibid. 93. As, if there be tenant for life, remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without shewing the deed, for since the right passed merely by the deed, to say any person released without deed will not be a good plea.

6 Co. 38. a. When a man shews a title in himself, every thing collateral to that title shall be intended whether it be shewn or not, for though the law requires an exactness in the derivation of the title, yet when that title is shewn, the law will presume all collateral circumstances in favour of right; for when lawful conveyances, which

are

are made with care, and on consideration, are brought forward, it would create too great nicety to require an exactness in the shewing of every collateral matter, and would tend to the entangling of right with too many difficulties, and therefore by the benignity of justice, they shall be intended: besides, a matter collateral to a title is what doth not enter into the essence or being of a title, but arises *aliunde*, so that there must be a good derivation of your right without it.

As, when a man declares of a grant or feoffment of a manor, the attornment shall be intended; for when a title is shewn to the manor, attornment of the tenant which is collateral to that title, shall be intended till the contrary is shewn on the other side *.

Co. Lit. 310.
Cro. Eliz.
401. * See
4 An. c. 16.
§ 9. where-
by all at-

torments of tenants are taken away.

So in trespass, the defendant conveys the house in which, &c. by feoffment from J. S. and justifies damage feasant; the plaintiff replies, that J. S. before the feoffment made a lease to J. N. who assigned to him; the defendant rejoins, that the lease was made on condition, that if J. N. assigned over without licence, by deed from J. S., that then J. S. should re-enter; the plaintiff surrejoins, that J. S. did give licence by deed, without any profert of the deed, and yet this surrejoinder was good, because the plaintiff's title was by assignment of the lease from J. N., and, consequently, the licence from J. S. is but a matter collateral to the assignment, and, by consequence, the deed must be intended to be well and legally made, though it be not shewn to the court.

6 Co. 38.
Cro. Jac.
102.

But if the matter be collateral to the plaintiff's title, then there is another difference, and that is where the deed is necessary *ex provisione hominis*, and where it is necessary *ex institutione legis*; for where the deed is necessary *ex institutione legis*, there, you must shew it, for it is repugnant that the law should require a deed, and not put you to shew that deed when it is made; as if you are obliged to shew the attornment of a corporation, there you must shew a deed, inasmuch as corporeal bodies, by the rules of the law, cannot act but by corporeal instruments; for the body consists in agreement and union, by creation of law, by patents or instruments under seal, and there is no act of the aggregate body but in the same manner, so that there can be no attornment without a deed, and the law cannot allow the attornment of such a body without it; therefore no attornment is shewn, unless a deed is shewn also.

6 Co. 38.

But when a deed is necessary *ex provisione hominis*, there, when it is collateral, as in case of the licence before mentioned, it need not be shewn, for the private act of the parties shall not controul the judgment of the law, that intends all such collateral matters without shewing.

Ibid.

There is a difference to be taken between things that lie in livery, and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shewn.

1st, Of things in livery; it is well known that livery was the ancient conveyance, which was a solemn delivery of land in sight of

of the inhabitants; and because this was done *coram paribus curiæ*, and the tenant ever after resided in the possession, it was reckoned the most notorious way of conveyance; and since this was the ancient *Gothick* way, and because they reckoned it of itself most manifest, the solemnities of a deed were not necessary.

2 Roll.
Abr. 682.

And therefore a man may plead that *J. S.* infeoffed him without saying *per indenturam*, and yet give the indenture in evidence, because the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is invested with the feud, and the indenture is only evidence of such feoffment.

Ibid.

But if a man pleads, that *J. S.* hath infeoffed him *per fait*, whether a man may give a parol feoffment in evidence, hath been reasonably doubted, because he has bound himself up to a feoffment by deed, and if the jury have only evidence of a parol feoffment, and yet find the issue, the deed may be used by way of estoppel ever after, where in truth there was no such deed.

2 Roll.
Abr. 682.

So, a demise may be had without deed, as well as a feoffment, for here the party resides in the possession, and therefore the old way of contracting governs in this case; and so a man may plead a demise without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good, whether there were any indenture or not; but if the demise were laid by indenture, it seems that they could not give a parol demise in evidence.

Co. Lit. 352.

Livery also is an estoppel, and is by *Coke* called an *estoppel in pais*, because it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony; for when solemnities are settled for transferring a possession, they ought to be held as sacred by the law; and therefore a man is concluded from destroying that of which he himself is the author, or from impeaching that which is held as sacred to transfer all possessions.

Ibid. 225.
Lit. § 365.

Therefore, if the defendant pleads the livery and seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without shewing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only.

Co. Lit. 226.
Lit. § 366.

But the jury are not estopped on the general issue, from finding such a conditional feoffment, for the jury are men of the neighbourhood that are supposed to be present at the solemnity, and they are sworn *ad veritatem dicendam*, and therefore they cannot be estopped from finding the truth of the matter, and, by consequence, may exhibit the condition on the feoffment.

But since the use of the solemnities before the men of the country had ceased, by allowing secret liveries only in the presence of two witnesses, therefore the statute of frauds and perjuries hath enacted, that no leases, estates, or interests of freehold, or for a term of years, or uncertain interest (not being copyhold) shall be assigned, granted, or surrendered, unless it be by deed or note in writing, under the hand of the party or his agent thereunto lawfully authorized in writing, or by act and operation of law, so that by this statute the ceremony of livery only is necessary.

sufficient to pass estates of freehold or terms for years; but it is not necessary to set forth such contract on the pleadings, for they are, as they were formerly, *fecerunt et demisit*.

A man may plead a condition to determine an estate for years, without deed; for this begins without any livery, and therefore the party is not estopped by any notorious ceremony from averring the condition. Co. Lit. 225.
Lit. § 365.

But where a man sets out a feoffment, the other party may reply, that it was by deed, and shew the condition, for then there is an estoppel; and so the matter is in equal balance, and therefore must be determined according to truth.

2dly, Of things lying in grant,—and these are all rights, as fairs, markets, advowsons, and rights to lands, where the owner is out of possession; and these being rights, they cannot possibly pass by investiture of the possession, because they cannot possibly be delivered over, or possessed, and therefore they must pass by the next sort of grants that holds the second place, in point of solemnity, and that is by grant under the hand and seal of the party.

Now a person that claims any thing lying in grant, must shew his deed from the party that had the original grant, or otherwise he must prescribe in the thing he pretends to, and the prescription being immemorial and supposing a grant, supplies the place of the grant.

He also that has a particular estate, by the agreement of the parties, must shew not only his own conveyance, but the deeds paramount, for there can be no title made to a thing in agreement, but by shewing such agreement, and the particular tenant ought to covenant to have the power of the deeds, inasmuch as he has no title, unless he can derive the estate that arises in agreement, up to the first original grant. 10 Co. 94.

But where any person claims any estate, by particular act in law, there, he may make his claim without shewing the deeds; as tenant in dower, or by elegit, or the guardian in chivalry, may claim an estate in a thing lying in grant without the deed; for when the law creates an estate, and yet doth not give the particular tenant the property of the deeds, it must be allowed that the estate be defended without them, otherwise the creation of the estate were altogether in vain. 10 Co. 93,
94.

So, they may plead a condition without shewing the deeds, because they claim an estate by the act of the law, and therefore are not estopped by the livery; so that they may claim an estate defeated by the condition without a deed: also, they are not supposed to have the deeds and muniments of the estate, and therefore for the reason formerly given, may do it without deed. Co. Lit. 225.

Note; 10 Co. 94. does not warrant this distinction, between tenant in dower, and tenant by the curtesy generally, but only in the case of a release made to the wife.

But tenant by the curtesy cannot claim an estate lying in grant, without deed, because he has the property in and custody of the deeds, in right of his wife, and that property cannot be defeated out of him, during the continuance of his estate. 10 Co. 64.
Co. Lit. 226. a.

10 Co. 94.
Co. Lit.
225. a.

So also he cannot defeat an estate of freehold without shewing the deed, nor can the lord by escheat do it without shewing the deed; for the act of livery is an estoppel that runs with the land, and bars all persons to claim it, by virtue of any condition without the condition appears in a deed, for the notoriety and solemnity of the act is that which makes it obligatory to all persons, so that they cannot impeach it, without shewing a precedent title, for that livery cannot be defeated, but by shewing something equally notorious; and since in both these cases the custody of the deeds resides with them, they must shew the condition.

Co. Lit. 267.
10 Co. 94. b.

So that the general rule is, where any person ought to have the custody of the deeds, there, where such person is compelled to shew his title, he ought to make a profert of those deeds to the court, for every man ought to have his deeds, and cannot take advantage of his own negligence in losing them; therefore in the case formerly put, of tenant for life, the remainder in fee, and a release is made to him in remainder, in such case tenant for life ought to make a profert of the deed, for in this case they have both parts of the same feud, and therefore tenant for life is supposed to be equally entitled to the deeds as he in remainder.

Co. Lit. 225.
Styl. Regr.
205.

But where a person is an utter stranger to any deed, there, in pleading, he is not compelled to shew it; for where he is not supposed by the law to have the custody of the deeds, he cannot be compelled in pleading to shew such deeds to the court, for that were to compel the party to impossibilities.

Co. Lit.
226. a.

As, if a man mortgageth his land, and the mortgagee leaseeth the land for years, reserving a rent, and then the condition is performed, the mortgagor re-enters; the lessee in bar of an action of debt shall plead the condition and re-entry, without shewing the deed, for the lessee was never, nor could be, entitled to the custody of the deed, and therefore it were altogether unjust to compel him to produce it.

Co. Lit. 226.

So, if a man bring a *precipe* against *A.*, he shall plead that he was only a mortgagee, and that the mortgage was performed, so that he hath no longer seisin of the estate, and this without shewing the deed; for upon performance of the condition, the property of the deed was no longer in the mortgagee, but it ought to be re-bailed to the mortgagor, and having no longer any title to the deed, he may plead the condition, without shewing it.

10 Co. 94.

So, in an action of waste, or in discharge of the arrears of rent, the tenant pleads a grant of the reversion and attornment, after such waste committed, or such arrear due, the tenant cannot shew the grant, *causa qua supra*.

5 Co. 74. b.

A deed enrolled must be offered to the court in pleading, though the deed be enrolled in the same court in which the plea is depending, for this is no record but a deed recorded; for a record must be the act of the court, and therefore the decisions of justice by the court, that lie as precedents for future observation, are the record of the court, and letters patent, which are the king's

king's acts, are the highest sort of records; but a deed enrolled is only a private act of the party authenticated in court; and from thence this difference is drawn, that letters patent enrolled in the same court, or records of the same court, need not be profered to the court, but a deed enrolled must; for all records that are publick acts, and that lie for the direction of the court, in matters of judicature, must be taken notice of, and therefore they need but refer to it with a *prout patet per recordum*, for the court will take notice of the course and orders of court, upon reference to them; but deeds are no more than the private act of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of the authority of it to give them credit; and therefore the court doth not take notice of them, unless they be pleaded. But the letters patent of another court the court doth not take notice of, unless they be offered, for since they are none of the records that are directed to this court of justice, it is not the office of the court to take notice of them, and therefore it is their duty to offer them as they do all other allegations.

10 Co. 92.
Stra. 520.

To a deed acknowledged in court, a man cannot plead *non est factum*, for being done in the court, the truth of the fact is so far to be credited, that he shall never deny the deed, but he may avoid the operation of the deed by pleading *reins passa par le fait*, for that doth not impeach the credit of the court, in which it was acknowledged.

Since the term, to avoid the entering up the several continuances of business, is reckoned as one continued law day, therefore deeds pleaded shall be in the custody of the law during the whole term, this being considered as the day wherein they are pleaded; and being then before the court, any body may take advantage of them. But since they belong to the custody of the party, if the deed be not denied, it shall go back to the party, after the term is over, and then nobody can take advantage of it, without a new profer; for then it is not before the court; and therefore the plaintiff in the King's Bench may take the advantage of a condition in a deed in his replication, because it is *et prædictus A. dicit*, as of the same term; but he cannot take advantage in a replication of a deed in the Common Pleas, because they enter an imparlance to another term: but where the deed comes in, and is denied, it remains in court for ever, because that is the only point in debate on which the decision of the court is founded, and therefore like all other decisions, it must remain among the other records of the court; and because it is tied up to this court, and is impossible to be removed, it shall be pleaded in another court without shewing.

5 Co. 74.
75.

As no party shall take advantage of his own negligence, in not keeping his deeds, which in all cases ought to be fairly produced to the court; so his adversary shall not take any advantage in his violent detaining of them; for the one by a violent taking away of the deeds gives a just excuse to the other for not having them at command, and no man can ever make any advantage of his own injury; and therefore it is a good plea for one party to

Co. Lit. 226.
2 Stra. 1186.
1192.

say, that the other entered and took away the chest wherein the deeds were.

Co. J. 32. In an action of debt upon a bond, it is matter of substance to make a profert of the deed, because this is the contract on which the court ought to found their judgment, and therefore it ought to be exhibited to the court.

2 Saund. It is not matter of substance to shew letters of administration, *402.* for whether they are legally granted or not belongs to the spiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, since it has different measures of judicature.

Evidence of Deeds.

10 Co. 92. Secondly, of giving deeds in evidence to the jury—and here *b. 93.* the general rule is, that where any thing is to be proved, the deed itself must be given in evidence, and not the copy of it; and the deed must regularly be proved by one witness at least.

Mich. 1718. This is now to be understood where the deed is of a late date, *in the Exch.* for if the deed be of thirty years standing, which now makes an *per Curiam.* ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read, without proof, though the witness to it be alive; and this the Lord Chief Baron *Gilbert* declared to be the rule of evidence at *nisi prius*: and if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed, unless the contrary be proved.

First, the deed ought to be given in evidence, and not the copy only, for though in records the copy was admitted in evidence, yet the law will not regularly allow it in private deeds, for they are not within the same reason as copies of records, for a record is fixed in a certain place, and therefore the original cannot be had, and, by consequence, the copy is the best evidence.

But deeds are only private evidences, and not fixed or confined to a certain place, but are lodged in the custody of the party, and not of the law, and therefore they must be produced in evidence; for the law requires the best evidence that the nature of the thing is capable of, and the deed is much better evidence than the copy of it; for the rasure and interlineation that might vacate the deed, might appear in the deed itself, and the very offering a copy carries a presumption, as if the original were defective, and therefore the copy is not to be admitted: besides, since the deeds are in the custody of the party, the deeds themselves must be produced, for a man cannot make his own fault in losing the deeds, any part of his excuse.

But there are some Exceptions out of this General Rule.

10 Co. 92. 1st, And that is where they prove the deeds themselves to be *b. 93.* burned with fire, for the proof of this matter will excuse the deed from being produced to the jury: but notwithstanding a profert is necessary to the court, for there is that conveniency in *Mch. 4. 94.* keeping *124. 266.* *L. E. 99. Pl. 31.*

keeping to known rules, that they cannot be broken, though they tend to the mischief of particular persons; and there cannot be a more convenient rule, than that the cause of every complaint ought to be shewed to the court, but the jury must go according to the evidence of the fact.

It hath been lately determined by the court of K. B. that a deed may be pleaded as

lost and destroyed by time and accident without a proferet. *Read v. Brookman*, 3 Term Rep. 351.

Now to prove the import of the deed, that it was in such an house, and that the house was burned, is the best evidence that can be had of such deed, and gives reasonable grounds for the jury to find it.

2dly, A copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the best evidence; for the presumption that opposes the copy is, because the original deed is, or ought to be, in the party's hands that would produce the copy; now that presumption is destroyed where the plaintiff proves the deed itself to be in the hands of the defendant, for then it cannot be presumed, that there was any better evidence, or that there was any interlineation that obliged the plaintiff to cover it, for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original.

A copy of an agreement between the abbot of *Quarner* and the monks of *Lyra* was produced in evidence; to which it was objected, that it could not be read, being neither a record, nor a publick instrument. But a copy of the *Oxford* statute (a) was exhibited, forbidding any book to be taken out of the *Bodleian* Library: and then the court allowed the copy of this agreement, though they considered it as not within the general rules of evidence, but received it on the very particular circumstances of this case.

Bath. 1, 1.

(a) This statute, it seems, should have been proved by a sworn copy.

But the copy of a deed must be proved by a witness that compared it with the original, for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original.

See Mod. 4. 94. 214. 256. 2 Keb. 31. 546. 3 Mod. 2, 2 = 47.

5 Mod. 211. 386. 6 Mod. 225. 248. 10 Co. 92. b. 93. 2 Vern. 471. 591. 603. Eq. Abr. 228. Stra. 401. 526. See L. E. 104. pl. 51.

Where the effect or contents of a deed are proved, and where the deed is afterwards given in evidence, and they disagree, there, the deed itself shall control the other evidence. So it is, where the jury on a special verdict collect the contents of a deed, and yet afterwards find the deed *in hæc verba*, the court, there, is not to regard the collection they have made of the substance of the deed, but the deed itself, for that collection derives its authority from the deed, and therefore must of itself fail and come to nothing, when it is opposite to the deed of which it is a collection.

Vaugh. 11.

3dly, Where the possession has gone along with any deed for many years, there, a very old copy of the deed may be given in evidence, with proof also that the original is lost; and that is according to the rule of the civil law, *Si vetustate temporis et judiciaria cognitione*

T t 3 *sint*

sint roborata, for possession could not be supposed to go along in the same manner, unless there had been originally such a deed, and so executed as the copy mentions, and the copy cannot be supposed to be only offered in evidence, to avoid sight of the original, since it is so ancient, that the antiquity alone prevents all suspicion of its being counterfeit, and the antiquity is known from the ancientness of the possession. But,

2^o. Whether such a copy shall be required without the proof of its being a true copy, by comparison with the deed itself?

5 Co. 54.
Style, 445.
Keb. 117.
Tri. per
Pais, 355.
Salk. 280.
Notwith-
standing
that deeds
of bargain
and sale en-
rolled have

4^{thly}, The inspection of a deed enrolled, shall be given in evidence, and where the deed needs enrolment, there, the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds by enrolment is also empowered to take care of the fairness and legibility of such deeds, and therefore a copy of such enrolment must be sufficient; for when the law hath appointed them to be made publick acts, the copy of such publick acts shall be, like all other publick acts, a sufficient attestation.

frequently in trials at *Nisi Prius* been given in evidence without being proved; yet the law may well be doubted. In support of the practice, the case of Smartle and Williams in Salk. 280. is much relied on; but that case is wrong reported; for it appears by 3 Lev. 387. that the acknowledgment was by the bargainor, and so it is stated in Salk. MSS. Besides, it appears from both the books that it was only a term that passed, and, consequently, it was no enrolment within the statute. Bull. N. P. 255-6.

5 Co. 54.
Style, 445.
Keb. 117.
Tri. per
Pais, 355.
Salk. 280.
2 Vern 471.
591. How-
ever, though
the deed
needs no
enrolment,
yet if it be
enrolled, it is now
the practice to admit it
in evidence without proof
of its execution.
1 Ventr. 296-7. In the
case of Smartle and Wil-
liams, Salk. 280. the
deed did not need en-
rolment, yet being en-
rolled on the acknowl-
edgment of the bargainor,
it was read against him
without being proved.
Bull. N. P. 256.

But where a deed needs no enrolment, there, though it be enrolled, the *inspeximus* of such enrolment is no evidence, because since the officer hath no authority to enrol them, such enrolment cannot make them publick acts, and, consequently, cannot entitle the copy of them to be given in evidence, because such practices may be improved to very ill purposes; for then if the deed were doubtful, it were but to enrol it, and bring the copy or inspection of it in evidence, and thereby avoid the giving in evidence a deed that was anyway suspicious.

Style, 445.

But the *inspeximus* on an ancient deed may be given in evidence, though the deeds need no enrolment; for an ancient deed may be easily supposed to be worn out or lost, and the offering the *inspeximus* in evidence induces no suspicion that the deed is doubtful, for it hath a sanction from antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made.

5^{thly}, The recital of one deed in another is no evidence of the deed recited, though the deed containing the recital be well proved, because there still wants an attestation of the first deed; but if the person objecting to the evidence of the recited deed, claims under the person who executed the deed that recites the former deed, the reciting deed is evidence against him of the reality of the recited deed, because he that claims under me stands in my place, and therefore what is evidence against me, must be evidence against him.

Thus

Thus in the case of *Fitz-Gerald and Eustace*; *Eustace* the plaintiff claimed in equity a debt on the defendant's estate, by virtue of a power reserved in the grandfather's settlement on the defendant's father, to charge the estate for payment of debts and younger children's portions; there, defendant objected that there were not proper parties, because the grandfather had made a mortgage, pursuant to that power, to one *Cox* who was not party to the bill, and did not produce the original mortgage, but only an assignment thereof to *Wybrants*, to which the grandfather was party; yet the court allowed it to be evidence of the original mortgage, because the plaintiffs claimed under the grandfather who was party to the assignment.

Mich 1718.
in the Ex-
chequer, per
Gilbert,
Chief Ba-
ron.

And in the following case, the recital of a bond in a deed executed by the same party who was the obligor in the bond, was allowed to be sufficient evidence of the bond. *A.* gave a bond to *B.* for payment of 2000*l.* within a year after his death, he having seduced her and had a child by her, and afterwards *A.* by deed-poll reciting that he had given such bond, agreed the 2000*l.* should be laid out in an annuity for the use of *B.* and the child for their lives. *A.* died. *B.* sued the administratrix on the bond, but there being only one witness to it, and (though his handwriting was proved, yet) he swearing that he did not see the bond sealed and delivered, *B.* was nonsuited, upon which she brought her bill to be paid out of the assets. Lord Chan. *King* held, that the recital in the deed that *A.* had given such a bond was sufficient evidence of there having been such, that it was a confession by the obligor himself, and stronger than a verbal confession, being under his hand and seal; and his lordship decreed accordingly.

Marchioness
of Annan-
dale v. Har-
ris, 2 P.
Wms. 432.

2dly, As to the second part of the rule, the deed must be proved to the jury by one witness at least, for though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is no full proof of the deed, for the delivery is necessary to the essence of the deed, and the deed takes effect from the delivery, so that unless the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witness who saw the delivery.

But to this Rule there are several Exceptions.

First, if the deed be (*a*) forty years old, that deed may be given in evidence, without any proof of the execution of it, for the witnesses cannot be supposed to live above forty years, and forty years is proof sufficient of a prescription; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that after forty years, the witness must be supposed to be dead, and therefore since no person living can be supposed to be coeval with such deeds, therefore they may be offered in evidence without proof.

Trin. Aff.
in Kent,
1700. *Tri.*
per Pais,
339. 346.
L. E. 101.
pl. 40.
Sid. 146.
Co. Lit.
6. b.
Keble. 877.
2 *Keble.* 826.
Skin. 239.
2 *Mod.* 320.
323. 3 *Salk.*

154. See *Lev.* 25. (*a*) Now reduced to thirty years. An ancient writing likewise (not being a deed) proved to have been found amongst deeds and muniments of an estate, may be given in evidence, although the due making of it cannot be ascertained; for it is difficult to develop ancient

facts, and finding these instruments and memorials in such a place, affords a presumption, that they were fairly obtained, and preserved for use. *Tr. per Pais*, 370. But an admittance into a tenement, holden of a manor, purporting to be under the steward's hand, though above forty years old, was rejected in evidence, because they could not prove the steward's hand. *Fort.* 43.

Aff. 1702.
per Haffet.

But it has been ruled, that if a deed be forty years old, and possession have not gone along with the deed, they ought to give some account of the deed, because the presumption fails that was established in behalf of such deeds, where there is no possession, for it is no more than old parchment, if they give no account of its execution.

Trin. Aff.
1700, in
Kent.

But if there be any blemish in the deed, by rasure or interlineation, then the deed ought to be proved, though it be forty years old: if the witnesses be living, they ought to prove it by the witnesses, but if the witnesses be dead, they ought to prove the hands of the witnesses, for though there must be (as is said) a presumption in favour of the deed when it was worn out of the memory of the witnesses, yet that presumption is encountered by another presumption from the blemishes of the deed itself, and therefore the credit of the deed ought to be restored by the proof of the execution of it.

Chattle and
Pound,
Hill. Aff.
1701, in
Kent.

So that if the deed imports a fraud, as where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title, there, the first deed must be proved, though forty years old; for the presumption from the antiquity of the deed is destroyed by an opposite presumption, for no man shall be supposed to be guilty of so manifest a fraud, and therefore here also the credit of the first deed must be restored, by proving a fair execution of it.

Roll. Rep.
192. 227.
Tri. per
Pais, 209.
Cro. Jac.
463.

If a deed of feoffment be proved, and the possession have gone along with the deed, there, the livery shall be presumed, though it be not proved; for when there has been possession in the manner that the deed sets forth, it founds a very strong presumption, that the possession was delivered in the manner that the deed sets forth; for that there should be a contract, to transfer possession, and that possession should go according to that contract, are such concurring circumstances as cannot be accounted for, unless the possession was transferred according to the contract, and, consequently, the livery and seisin must be supposed by the jury.

Pl. Com.
6. 7.

But if possession have not gone along with the deed, then the livery must be proved upon the feoffment; for since the livery is to give the possession on the deed, where no possession is, the presumption is, that there was no livery, and, consequently, the livery must be proved to encounter that presumption.

Roll. Rep.
132. *Tri.*
per Pais,
339.

But if the jury find the deed of feoffment, and that the possession hath gone along with the deed, yet the judges upon such finding, cannot adjudge it a good conveyance, for the jury are judges of the fact, and what is probable, and what is improbable; the court is only judge of what is law, and have nothing to do with any probabilities of fact; therefore it is the jury only that are to make the conclusions and deductions as to the truth of the fact; the court cannot make any conclusions or deductions of the truth

truth of facts, if they are not drawn by necessary consequence out of the words of the verdict; for to the court the rule is *De non apparentibus et non existentibus eadem est ratio*, therefore they cannot conclude that there was a lawful conveyance, unless the jury find the delivery of the deed.

A deed of feoffment may be given in evidence as a release, for where the party is in possession already, the deed only will be a sufficient contract to transfer a right. Tri. per Pais, 209.

Secondly, A deed may be given in evidence, on a rule of court without proving such deed, for if the party consent, that shall be looked upon as a good deed, and that rule is evidence of the validity of such deed, for the consent of parties concerned must be sufficient and concluding evidence of the truth of such fact, for the jury are only to try the truth of such facts wherein the parties differ. 2 Sid. 269.
Tri. per Pais, 347.

A deed which comes out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence without proof of the execution; for the other party not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution. Rex v. Inhabitants of Middlezoy, 2 Term Rep. 41. and the cases there cited.

As to Rasure, Interlineation, and Addition.

Formerly, if there were any rasure or interlineation, the judges determined upon the profert of the deed and view of it, whether the deed was good or not; for the very contrivance of the solemn contracts, such as deeds are, and their preference to verbal contracts, was founded on this, that the intent of the parties is there manifestly settled in express words, and notoriously authenticated, and, there, such contracts are totally referred to the court, if the truth of the solemnities, *viz.* of the seal, and of the delivery, be admitted, and therefore must be dissolved by a contract of equal solemnity, because how they are destroyed and avoided, must appear to the same judges that are by the law to determine of them: From hence also it came to pass, that if a deed was razed or interlined, they adjudged it a void deed, because it did not certainly appear to the court, who were the judges of those solemn contracts, whether the mind of the party was contained in such a mangled contract or not. 10 Co. 92.

But as the manner of conveyancing swelled from the short little deeds to large and voluminous ones, so vast room was left to the misprisions of the clerks, that must be altered and amended, or with greater labour and expence of time written over again; from thence the court thought it necessary not to discharge the deeds razed or interlined as void, upon the demurrer; but they referred to the jury upon the issue of *non est factum*, whether this deed, thus razed and interlined, was the individual contract delivered by the parties. Ibid.

If a deed be altered by a stranger without the consent of the obligee, in a point not material, this doth not avoid the deed; but otherwise it is, if it be altered by a stranger in a point material, for 11 Co. 27.
2 Str. 1163.

for the witnesses cannot prove it to be the act of the party that sealed and delivered it when there is any material difference from the sense of the contract; but if the contract contain the sense of the parties, the witnesses may well swear it to be their act, for an immaterial alteration doth not change the deed, and, consequently, the witnesses may attest that very deed without danger of perjury.

11 Co. 27. But if the deed be altered by the party himself, though in a point not material, yet it will avoid the deed; for when the party himself makes any alteration in his own deed, it discharges the contract, for the contract hath the whole form from the words of the obligor; now when the obligee undertakes to supply it with new words, and to alter those the party hath fixed upon, this is, according to the rules of law, which takes every man's own act most strongly against himself, a new making and a new framing of the contract, and for a man to contract with himself is utterly void and ineffectual.

Another reason of this interpretation of law might be, to add a sanction to deeds, that persons, who had them in their custody, might not alter them for fear of destroying their own securities.

11 Co. 28. b. If there be several covenants in the deed, and one of them be altered, this destroys the whole deed, for the deed is but a complication of all the covenants, so that the deed, which is the whole, cannot be the same, unless every covenant of which it consists be the same also.

2 Roll.
Abr. 29.
(a) *Quere*,
whether
that be not
afterwards
vacated by
an interline-
ation?

All interests that pass without deed, would pass, though the deed was afterwards interlined or altered (a): yet the interest once vested did not thereby return back again, since the deed is not absolutely necessary to the passing of the interest, but is only evidence that it was passed. But by the statute, it is necessary to shew a writing under the hands of the parties.

Roll. Rep.
39, 40.
2 Roll.
Abr. 29.

If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet the obligation is void; for where there is a material part of the contract added after the sealing and delivery, it is not the same contract that was sealed and delivered: But if there be a blank left in an obligation, and filled up afterwards with something immaterial, this doth not avoid the contract.

Roll Rep.
39, 40.

As, if a bond was made to C. with a blank left for Christian names and addition, which is afterwards filled up by the assent of the parties, yet this is a void bond.

Vent. 185.

But if any immaterial part of the contract be added after sealing and delivery, yet it is in effect the same contract, and therefore it shall not be avoided by these additions.

Ibid.
2 Lev. 35.
2 Keb. 872.
881. Moor,
547. 619.
Cro. Eliz. 627.

As if A. with a blank left after his name, be bound to B. and after C. be added as a joint obligor, yet this does not avoid the bond, because this does not alter the contract of A. for he was bound to pay the whole money without such addition.

Where a thing lies in livery, a deed formerly sealed, may be given in evidence relating to it, though the seal be afterwards torn off, for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the livery doth not return back again, though the deed was cancelled, and the deed is only an evidence of transferring possession, for by the act of livery the possession passes, and the deed without the seal (the livery being indorsed) is an evidence of such possession: so, if the conveyance was made by lease and release, the uses were once executed by the statute, and do not return back again by cancelling the deed.

Palmer, 403.
Med. 11.
Vent. 14.
2 Keb. 556.
2 Lev. 220.
2 Show. 28.
But see now
the statute
of frauds.

But, if a man shews a title to a thing lying in grant, there he fails, if the seal be torn off from his deed; for a man cannot shew a title to a thing lying in solemn agreement, but by solemn agreement, and there can be no solemn agreement without a seal; so that possession alone is no good title, since the thing itself doth not lie in possession but in agreement; therefore a man cannot claim a title to a water-course, but by deed and under seal.

2 Bull. 79.
Roll. Rep.
183.

Where a contract creates an obligation, it cannot be pleaded, if the seal be taken off, for the seal is the essential part of the deed, and without a seal it is no longer a deed, nor to be pleaded, nor given in evidence as a deed, unless in the case above mentioned, where the interest vests, though the deed hath no continuance: but where the deed is necessary to be shewn, in order to acquire the interest, there, it must have the essentials of a deed, when it is shewn as such.

Id. 39, 40.
2 Bull. 246.
2 Roll. Abr.
28, 29, 30.

If an obligation were sealed when pleaded, and after issue joined, the seal be torn off, yet shall the plaintiff recover his debt, because the deed when proferred to the court was in the custody of the law, and therefore the law ought to defend it: besides, the truth of the plea, which is to be proved, must have relation to the time when the issue was taken, and at the time of the issue it had the essentials of a good deed, and therefore that is sufficient to maintain the issue.

Owen, 8.
Cro. Eliz.
120.
5 Co. 119. b.
2 Bull. 247.
Dyer, 59.
pl. 12, 13.
Co. Lit.
283. a.
Doct. Placit.

262. Roll. Rep. 39, 40. 2 Roll. Abr. 29.

Also, if the seal of a deed be broken off in court, it shall there be enrolled for the benefit of the parties, because where any thing is impaired under the custody of the law, it shall be restored by the benignity of the law as far as possible.

2 Inst. 676.

If there be a joint contract or obligation, and one of the obligor's seals be torn off, it destroys the obligation, because they are both bound as one person, and if one be discharged, the other cannot stand obliged, because they both make up but one obligor.

Noy, 112.
2 Roll. Rep.
30. 40.
5 Co. 23. a.
Cro. Eliz.
Croph. 161.

546. Doct. Placit. 260. 262, 263.

But if two persons be bound severally, there, if the seal of one of the obligors be broken off, yet the obligation continues in the other, because there are several contractors, and several contracts, and therefore by destroying the obligation of one of them, the obligation of the other is not taken away.

5 Co. 23. a.
Cro. Eliz.
546.
Roll. Rep.
40. 2 Roll.
Rep. 30.
149. Cro.

Eliz. 408. 546. 576. 11 Co. 28. b. Doct. Placit. 260. 262, 263.

But

March, 125.
a Show. 29.

But if two men are bound jointly and severally, and the seal of one of them is torn off, this is a discharge of the other, for the manner of the obligation is discharged by the act of the obligee, and therefore that is (according to the rule of law, that contrives every man's own act most strongly against himself) a discharge of the obligation itself: besides, since both are jointly bound as one person, the discharge of one of them is a discharge of both; a satisfaction is supposed by the very cancelling of it to be given for the whole debt, and no obligation can rest upon the other.]

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

5 Co. 68.
a. b.
3 Co. 155. a.
Keilw. 49.
(a) For this
wide tit.
Agreements.
(b) As to

records it seems a general rule, that nothing can be admitted, though sworn by witnesses of the best credit, that contradicts them; for being things of the greatest credit, they can only be questioned by matters of equal notoriety with themselves. Roll. Abr. 757. (c) *Vide Vern.* 369.

a Vern. 98.
337. 625.

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence, that may be offered to a jury, and evidence to inform the conscience of the court, *viz.* that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence.

5 Co. 68.
Lord Chy -
ney's case.
¶ (d) Here,
there is a
latent am -
biguity;
the words
themselves
prima facie
do not im -

port an ambiguity; but the ambiguity ariseth from something *alters*, some collateral matter out of the instrument itself. And as such ambiguity is made to appear by parol evidence, parol evidence must be admitted to explain it, as well as to raise it. See Bac. Max. Reg. 23. But where there is an absolute omission of the devise, it cannot be supplied by parol evidence. *Cattledon v. Turner*, 3 Atk. 257.]

Abr. Eq.
230, 231.
Mich. 1705.
Pendleton
and Grant.
2 Vern. 517.

So, where J. S. devised all his household goods, as woollen, linen, pewter, and brass whatsoever, except a trunk under the chamber-window; and the question was, whether the parol proof of the person who drew the will should be admitted to explain these

these words? my Lord Keeper thought it might, notwithstanding the statute of frauds and perjuries; for here, it neither adds to, nor alters, the will, but only explains which of the meanings shall be taken; as in case of a devise to son *John*, when the testator had two of the same name; and here the word *as* may be a restriction; or if the following words be as particular instances, it may not restrain the word *whatsoever*; and he thought the words imported to carry all the household goods; and of that opinion was the master of the rolls; and the proof was read accordingly.

[So, where *J. S.* being seised in fee of a real estate as heir on the part of his mother's mother, and being also seised in fee of a small estate as heir to his own father, devised all these lands to trustees and their heirs in trust to pay several annuities and charities; after payment of which he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side for ever; and the question was, whether the heir of the mother's father, or the heir of the mother's mother was entitled to the residue of the rents and profits? parol evidence was admitted to shew, which heir of the mother's side was intended.

Again, *R. H.* devised to the defendant several closes of the value of 60*l.* per annum, paying 100*l.* he owed to *J. S.*, and 100*l.* he owed by bond to one *Shaw*; and devised some small legacies, and gave all the rest of his personal estate to the plaintiffs, his nieces. It happened that the 100*l.* due on bond was not due to *Shaw*, but was the money of *Alice Beck*; then the wife of one *F.* By reason of this mistake, the devisee of the land refused to pay the 100*l.* The plaintiff examined *Harvey* who drew the will, and deposed that the testator declared, he meant the 100*l.* due to the person who married *Mrs. Beck* of *Lincoln*; and another witness deposed, that he meant the bond for which *C.* was bound as his surety: Decreed for the plaintiff, first at the rolls, and afterwards on a bill of review before the Lord Chancellor, and heard on the merits, and again decreed on the merits; his lordship declaring he saw no hurt in admitting collateral evidence to make certain the person or the thing described. And Lord *Thurlow* in a late case (a) said it was a clear proposition, that every evidence as to the description of the subject the testator had described, must be admitted. As in the case of a specific legacy, you must hear evidence concerning the subject to which the will applies, in order to see whether the description applies aptly or not.

So, parol proof hath been admitted as to the intention of a testator, where the question hath been, whether a legacy should go in satisfaction of a debt due from the testator to the legatee, or whether a sum advanced on the marriage of a child should go in satisfaction of a legacy?

Fowler v. Fowler, 3 P. Wms. 354. Lord Talbot said, his opinion was against the admission of such evidence.

It also hath been admitted in equity, to prove a variation between the agreement executed and the agreement intended, upon a suggestion that such variance hath happened through mistake, fraud, &c.

Company, 1 Vez. 317. *Baker v. Baker*, Id. 456. *South Sea Company v. D'Oilly*,

Harris v. Bishop of Lincoln, 2 P. Wms. 135.

Hodgson v. Hodgson, 2 Vern. 593. Pr. Ch. 229. S. C.

(a) *Fonnc-reau v. Poyntz*, 1 Br. Ch. Rep. 477.

Cuthbert v. Peacock, 2 Vern. 593. *Debeze v. Man*, 2 Br. Ch. Rep. 165. In

Henkle v. Royal Exchange Assurance Company, 1 Vez. 376. *Wheat*

Fitcaine v. Ogbourne, *Ibid.* *Lady Skelburne v. Lord Inchiquin*, 1 Br. Ch. Ca. 338. *Harvey v. Harvey*, 2 Ch. Ca. 180. *Per Reynolds C. B. in Fitzgerald v. Lord Fauconberg*, Fitzg. 213. But in *Hardwood v. Wallis*, cited in 2 Vez. 195. parol evidence for this purpose was rejected. In that case, an estate was agreed to be settled prior to marriage on the intended husband for life; remainder to wife for life; remainder to the first, &c. son in tail-male; remainder to all and every the daughters of that marriage. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitation to the sons in tail-male; where he stopped, and wrote, *then go on as in Pippin v. Ekins*; which was a precedent he delivered to his clerk to go on from that limitation, and was a right settlement on the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband without restraining it to that marriage. It was executed with this mistake. The plaintiff was the only daughter of that marriage: the husband by a second wife left a son and four daughters, the defendants. It was insisted, that letting in the daughters of the second marriage would make the first wife a purchaser for them, or the children of other successive wives, to the destruction of the interest of her only child: the draft of the attorney was proved, and the settlement in *Pippin v. Ekins*. But the Master of the Rolls, Sir Wm. Fortescue, would not admit the parol evidence of the attorney to be read; and held, that the other evidence would not do: that nothing appearing in writing under the hands of the parties, the settlement could not be altered.—Evidence of this kind, it must be observed, seems to be more readily admitted to rebut an equity, than to obtain a decree upon. *Legal v. Miller*, 2 Vez. 299. *Jones v. Statham*, 3 Atk. 388. *Eden v. Lord Bute*, 7 Br. P. C. 204. 445.

Doe v. Burt, 1 Term Rep. 701. *Rex v. Inhabitants of Sambourne*, 3 Term Rep. 609. So, parol evidence is admissible to shew whether a thing be parcel or not of the estate demised by a deed. So, to shew that persons describing themselves in a certificate as officers of the parish at large, were the officers of the hamlet where the pauper was settled. In explanation of mercantile contracts it is every day's practice to resort to it.] *Per Lord Hardwicke in Baker v. Paine*, 1 Vez. 459. and *Blunt v. Cumyns*, 2 Vez. 331.

Vern. 366. It has been held, that if *A.* purchases land in the name of *B.*, that *A.* may be admitted to prove that he paid the purchase money, and so make it a resulting trust, or trust by implication of law for himself. [Parol evidence offered to raise an equity, that a pension granted by the crown to the defendant absolutely and without any terms, was in trust for the plaintiff, the defendant by his answer denying it, was rejected by Lord Thurlow, after much argument and long deliberation. *Lady Margaret Fordyce v. Willis*, 3 Br. Ch. Rep. 577.]

Rex v. Inhabitants of Scammonden, 3 Term Rep. 474. *Filmer v. Gott*, 7 Br. P. C. 70. But in *Clarkson v. Hanway*, 2 P. Wms. 203. it was holden, that the grantee could not give parol evidence to prove blood and kindred to have been the consideration of a conveyance, the consideration expressed in the deed being an annuity to be paid to the grantor. And in *Peacock v. Monk*, 1 Vez. 128. Lord Hardwicke said, “where any consideration is mentioned, as of love and affection only, if it is not said also, and for other considerations, you cannot enter into proof of any other: the reason is, because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. It is otherwise, where there is no consideration at all in the deed.” [So, it is competent to a party to aver other considerations than those expressed in a deed. Thus, where the consideration expressed in the deed was 28*l.*, parol evidence was admitted to prove, that the real consideration was 30*l.* So, where the considerations mentioned in the deed were 10,000*l.* and *natural love and affection*, the lords commissioners of the great seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates which were conveyed by the deed being worth 30,000*l.* On an appeal this was confirmed; and the jury on the trial of this issue, finding that *natural love and affection* constituted no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.]

An entry in the steward's book, and parol proof by the foreman of a jury was admitted as good evidence, to shew that a feme covert surrendered her whole estate, although the surrender upon the roll, and the admission thereon, was but of a moiety.

2 Vern. 547.
Hill and
Wigget.

Also, to oust an implication, and rebut an equity, parol evidence has been admitted to explain the intention of the testator; as where a man devises particular legacies to his executors, and makes no disposition of the surplus of his estate; in this case, according to the notions of the courts of equity, the executors shall be only trustees for the next of kin; but to rebut this equity which arises by implication only, the executors have been allowed to prove by parol evidence, that the testator designed them the surplus.

To this purpose are the cases in Vern. 473. Foster and Munt. Chan. Ca. 19. b. Crompton and North, 2 Vern. 99. Pring and

Pring, 2 Vern. 642. Lady Granville and Dukes of Beaufort, 2 Vern. 736. [Batchelor and Seal, Eq. Ca. Abr. 246. S. C. Gilb. Eq. Rep. S. C. *Infra* vol. 3. 69. S. C. Duke of Rutland v. Dukes of Rutland, 2 P. Wms. 210. Petit v. Smith, 1 P. Wms. 7. Bradsbridge v. Woodroffe, 2 Atk. 68. Lake v. Lake, 1 Will. 313. Ambl. 126. S. C. But in Blinkhorne v. Featt, 2 Vez. 28. Oct. 1750. Lord Hardwicke expresses himself to be very tender in admitting parol evidence in cases of this kind; and it should be restricted to what passed at the time of making the will. Nourse v. Finch, 1 Vez. jun. 358. And Lake v. Lake, Nov. 1751. is the last case (in print) which has been decided since that time on parol evidence.]

So, where the Earl of *Gainborough* made his will, and thereby devised several legacies, and charged his real estate with the payment of them and his debts, and devised his estate, so charged, to the defendant, his nephew, and made the plaintiff, his wife, executrix; and the bill was brought to have the personal estate discharged from the debts and legacies, suggesting that the creditors threatened to come upon and exhaust the personal estate; and that it was the intent of the testator, that she should have the personal estate clear to herself, and that the directions for making the will were so; but that, either by the mistake or contrivance of the person who drew the will, it was not so expressed; and on demurrer, because no such averment could be admitted against a will in writing, the demurrer was over-ruled; it was held by *Ravulinson* and *Hutchins*, that though such an averment could not be admitted where it was to make the party a title; yet where it was only to rebut an equity, as in this case, it might.

2 Vern. 252. Countess and Earl of Gainborough, Abr. Eq. 230. S. C. and affirmed in the House of Lords.

So, where one not of kin, but a stranger, was made executor, and had considerable legacies given him, although it was decreed by sir *Peter King*, in the mayor's court, in favour of the testator's brothers, that the surplus should be distributed; yet, upon appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

Abr. Eq. 245. Littlebury and Buckley, affirmed in the House of Lords.

[And as parol evidence is admissible in favour of the executor to shew no resulting trust for the next of kin, so it hath also been admitted in favour of the next of kin, to take off the effect of the parol evidence adduced by the executor. And it seems from some cases (a) that it may be read by the next of kin originally and in the first instance.

Bishop of Cl-yne v. Young, 2 Vez. 95. Coote v. Bond, 2 Br. Ch. Rep.

526. (a) Fane v. Fane, 1 Vern. 30. Rackfield v. Careless, 2 P. Wms. 158.

Coote v.
Boyd, 2 Br.
Ch. Rep.
522.

Roe v. Pop-
ham, Dougl.
24-

Vide 2 Veth.
98. 337.
625. and
Salk. 234.
pl. 13.
2 Ld. Raym.
831. where,
in the case
of Cole and
Rawlinson,
it is laid
down by my
Lord Chief
Justice
Holt, that
the testa-
tor's intent
must be

collected from the words of the will, and not from his circumstances, or any matters *dehors*, and that to ravel into the affairs of the testator, would render property precarious, and introduce uncertainty and confusion in the law itself.

Selwin and
Brown,
21st March
1734, in
*dono procu-
rum*. Note;
This cause
was first
heard before
his honour
the master
of the rolls,
who admit-
ted the parol
evidence,
and on the
strength
thereof de-
creed, that
the 3000*l.*
should not
be taken as
part of the
surplus of
the testator's
personal es-
tate; but
that it was
extinguished
for the be-
nefit of the
obligee, and
accordingly
ordered the
bond to be
cancelled;
but this de-
cree was re-

Where a testator gave legacies of the same amount in two different instruments, parol evidence was admitted to shew that he intended them to be accumulative.

Where a fine is levied, if no uses are declared, the resulting uses shall be to the conusor, but parol evidence is admissible to rebut the presumption of such resulting uses.]

But notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain that too much caution cannot well be used in this particular, especially when it is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence and uncertainty, binds the courts of equity as well as the common law courts; as also that little regard ought in many cases to be had to the expressions of the testator, either before or after the making of his will, because, possibly, these expressions might be used by him, on purpose to control or disguise what he was doing, or to keep the family quiet, or for other secret motives and inducements which cannot after his death be found out.

Hence, in a late case in the House of Lords, where the testator devised several legacies, and amongst the rest gave considerable legacies to his two executors, to whom also he devised the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that, there being sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit, by his being made co-executor; and that though the surplus of the estate was devised to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished; and, by the evidence of the person who drew the will, fully proved, that this was the testator's intention; which evidence, it was urged, ought to be admitted, being only to rebut an equity, and oust an implication of law arising from the notions of the courts of equity, which revives the debt in these cases, and gives equal benefit to both the executors; but the lords refused going into this parol evidence, and decreed that the 3000*l.* should be taken as part of the surplus of the testator's personal estate, which both the executors were equally entitled unto; for though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy other creditors: also, it has been (a) resolved to be assets to satisfy legacies; and this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court as any particular legacy, it was but fitting, that since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts

courts in matters of this nature, that there should be the same measure of justice in both these courts.

versed by
my Lord
Chancellor,

though he admitted the parol proof to be read, as not thinking the testimony of a single witness, according to the circumstances of this case, sufficient to control what appeared on the face of the will. Ca. temp. Talb. 240. S. C. 4 Br. P. C. 179. S. C. (a) For this *vide* Yelv. 160. Plow. 186. a. Co. Lit. 264. 8 Co. 136. a. Cro. Eliz. 373. Hob. 10. Leon. 320.

[A testatrix bequeathed her real and personal estate to *E. T.* and *J. U.* equally between them for life; and upon the death of *E. T.* she gave the whole estate to *J. U.* in tail general, and for want of such issue to *R. U.* in fee, with a few pecuniary legacies; and charged the real estate with the payment of these legacies; if her personal estate should not be sufficient; and by her will declared, she gave all the rest and residue of her personal estate to her uncle *L. C.*'s three daughters; and particularly gave to Mrs. *S. L.* 10*l.* and made her executrix. For the residuary legatees it was insisted, that *rest* and *residue* of her personal estate must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and, consequently, the testatrix has disposed of the whole: that parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of *L. C.*, might be admitted in this case; that (to be sure) things which are quite contrary to the will shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder of the drawer: that this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. Lord *Hardwicke* — As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion, that this is not a case in which parol evidence can be read, and that it would be of dangerous consequence. It is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only; for I do not know that upon the construction of a will, courts of law or equity admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same name, or there has been a mistake in a christian or surname, and this upon absolute necessity; where if such evidence were not let in, it would make the will void. The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin, parol proof has been admitted to ascertain the person who was to have the residue. It is very true, cases may be cited, where Lord *Corsper* has admitted such evidence; for he went upon this ground, that it was by way of assisting his judgment in cases extremely dark and doubtful. I have the greatest deference for his judgment, but must own, I was never satisfied

Ulrich v.
Litchfield,
2 Atk. 372.

Dowset v.
Sweet,
Ambli. 175.
Bradwin v.
Harpur,
Id. 374.

with this rule of Lord *Couper's* of admitting parol evidence in doubtful wills: besides, he went further in the great case of *Strode and Ruffel*, in which there was an appeal to the House of Lords: Mr. Justice *Tracy*, who assisted Lord *Couper* in that case, was at first of the same opinion with him; but on considering it more, he disavowed his former opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the House of Lords. In the case of *Selwin and Brown*, I was of opinion that it ought to have been admitted; and even Lord *Talbot*, when he had heard the cause, had a remorse of judgment at the same time that he rejected the parol evidence: but the House of Lords refused it as of most mischievous consequence, and affirmed his decree.

Lowfield v.
Stoneham,
2 Str. 1261.

Upon *plenè administravit* pleaded, the question was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix to her husband, and, consequently, assets? It arose upon the following devise:—"I give to my loving brother *John Stoneham* 1000*l.*, and in case of his death, to his wife *Susanna*," who was the defendant. It appeared that *John Stoneham* survived the testator: the plaintiff therefore insisted, that this legacy, which the defendant admitted that she had received, vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator *in extremis* declared, he meant to give his brother only the interest of the 1000*l.*, and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff's counsel, as being contradictory to the plain words of the will. And *Lee*, Chief Justice, said, it could not be allowed, and that in the case of *Selwin and Brown*, the House of Lords had refused it, even where it was to support the legal interpretation of the will; and Lord *Hardwicke* about two years ago held it in the same manner in the case of the Earl of *Inchiquin* and *O'Brien*.

Meres v.
Ansell,
3 Will. 275.
Preston v.
Morreau,
2 Bl. Rep.
1249.

Although parol evidence may be received to explain, yet it can never be admitted to annul or substantially to vary a written instrument. An action on the case was brought for the use and occupation of a house, of which, it was agreed in writing, that a lease should be let by *Christiana Preston* to *Abraham Gamage* for twenty-one years, at 26*l. per ann.* to commence from *Michaelmas* then next. *Gamage* died and made *Merreau* his executor, who paid 26*l.* into court for one year's rent. On the trial, the plaintiff offered to shew by parol evidence, that besides the 26*l. per ann.* the defendant had agreed to pay 2*l. 12 s. 6d.* a year, being the ground-rent of the premises to the ground landlord; but no evidence was offered of the actual payment of such ground-rent during the testator's life; without which *De Grey*, Chief Justice, thought such parol evidence inadmissible, and nonsuited the plaintiff. On a motion to set aside this nonsuit, it was alleged, that this was evidence not to alter or vary, but to explain the agreement. That this was not a solemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry this into execution, parol evidence would have been admitted to prove the agree-

ment to pay the ground-rent. For in *Joyne v. Statbam*, 3 Atk. 388. parol evidence was admitted to shew, that the agreement for a lease at 9*l.* a year was to be clear of taxes. But by *Blackstone*, J. I am clearly of opinion that the lord chief justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements; else the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement, for that is in effect to vary it. Here is a positive agreement that the tenant shall pay 26*l.* Shall we admit proof that this means 28*l.* 12*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, so as he is obliged to pay more than his contract expresses? we can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters, it might be otherwise. He might shew who is to put the house in repair, or the like, concerning which nothing is said; but he cannot by parol evidence shorten the term to fourteen years, or extend it to twenty-five years, or make the rent other than 26*l. per ann.* The case in *Atkins* is of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to inquire who was to pay the taxes. Besides, there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write.

In a debt upon a bond payable at a certain day, the defendant pleaded, that by agreement between the defendant and the plaintiff's testator, the bond only stood as an indemnity. To this plea the plaintiff demurred, and the question was, whether the agreement pleaded could be given in evidence, contrary to the express tenor of the bond, purporting to be absolute, for payment on the day? The plaintiff contended, that the office of parol evidence extended no farther than to explain a deed consistently with its general purport, and by no means to change the nature of the special obligation; and that even on a will, the uncertainty to be removed by evidence must arise from something extrinsic to the instrument. The court agreed the plea to be bad, and the objection decisive against admitting collateral evidence to change the nature of the deed.

In no case can parol evidence of a parol communication between the parties be received, to add a term not inserted in the specific agreement which they have executed; for what has passed between them may have been altered and shifted in a variety of ways, but what they have signed and sealed was fully settled. And my Lord *Thurlow* laid it down as a rule of law, which it was impossible to break in upon, that nothing could be added to the written agreement, unless in cases where there is a clear, subsequent, independent agreement varying the former, not where it is of matter passing at the same time with the written agreement.

The verbal declarations of an auctioneer cannot be admitted to contradict the printed conditions.]

Mease v. Mease,
Cowp. 47.

Haynes v. Hare, 1 H.
Bl. 664.
Lord Port-
more v.
Morris,
2 Br. Ch.
Rep. 249.
Rich v. Jackson,
4 Br. Ch.
Rep. 519.

Gunnis v. Erhart,
1 H. Bl. 289.

(H) Of Presumptive Proof.

Gillb. L. E. 323. [A Presumption, as defined by the *civilians*, is *conjectura ex certo signo proveniens quæ alio adducto pro veritate habetur*. For when the fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances that necessarily and usually attend such facts, and these are called presumptions, and not proofs, for they stand instead of the proofs of the fact till the contrary be proved.]

Co. Lit. 6. My Lord Coke distinguishes presumptive proof, by which he says juries are often induced, into, 1. Violent presumption, which amounts to *plena probatio*; as if one be stabbed in a house, and a man be seen running out of it with a knife bloody, and none else in the house. 2. *Presumptio probabilis*, which moves a little. 3. *Presumptio levis*, which moves not at all.

Co. Lit. 6. Also, in case of a feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for any (a) length of time will make a strong or violent presumption, which stands for proof; and here the rule is, that *ex diuturnitate temporis omnia presumuntur solemniter esse acta*: also, the deed may receive credit by comparing the seals, the hand-writing, and other circumstances, all which must be left to the jury.

(a) Where from their antiquity things receive a credit. Mod. 117. Lev. 25. & vide Palm. 427. [If a man gives a receipt for the last rent, the former is presumed to be paid, because a man is supposed first to receive and take in the debts of the longest standing; especially if the receipt be in full of all demands, then it is plain there were no debts standing out; and if this be under hand and seal, the presumption is so violent, that the law admits of no proof to the contrary; because that were to let a man invalidate his own deed, which our law doth not permit; for here, though the payment of the money is not proved, yet the acquittance is proved, which could not be without such payment.]

Per C. r. in Harpur v. Brock, &c. Tr 14 G. 3. 3 Wooddes. 333. Where a lease is proved, and it is also shewn, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it upon the adverse party to shew that the lease is subsisting. And *Eyre*, Baron, held, that where rent is received without any proof of a lease, this also *primâ facie* is evidence for the plaintiff, and obliges the defendant to shew, that it is either a quit-rent, or that the term is unexpired.

Denn v. Barnard, Cowp. 595. Possession, and rent received, for twenty years, were holden to be admissible evidence of a fee, to be left to a jury; though the title, so far as it was developed, appeared to be a long term of years; for it might be a term attendant on the inheritance, and the lease one of the muniments of the estate.

Oswald v. Legh, 1 Term Rep. 270. The circumstance of twenty years having elapsed without any demand made, is of itself a presumption that a bond has been paid. And satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption, as an account settled between the parties in the intermediate time without any notice being taken of such a demand.

If a person claiming a toll for passing over a highway, can shew that the liberty of passing over the soil, and the taking of a toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though served since, it will be presumed, that the soil was originally granted to the publick in consideration of the tolls.

Lord Pelham v. Pickersgill, 1 Term Rep. 660.

If a ship has been missing, and no intelligence received of her within a reasonable time after she failed, it shall be presumed that she is lost.]

Green v. Brown, 2 Str. 1191. Newby v. Read, Sittings after Mich. 3 Geo. 3.

Persons once in being shall be intended still living, if the contrary is not proved *.

2 Roll. Rep. 461.

in ejectments, &c. great caution is required in making out a pedigree, &c. not to prove the birth of any person, through whom the title is not deduced, and who might be heir, &c. if living; and to be prepared with proof of the death of such person, if set up by the adverse party.

* Therefore

But now by 19 *Car.* 2. c. 6. it is enacted, "That if any person or persons, for whose life or lives, estates have been or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof made of the life or lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners; in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

[In ejectment the case was as follows: John Gifford was seized in fee of the lands in question, and made a lease in reversion to Lewis Davells for 99 years, to commence after the deaths, or other sooner determination

tion of the estates of John Davells the father, and John Davells the son, who had then a lease in possession for 99 years, if they or either of them so long lived. The plaintiff positively proved the death of John Davells the son; but as to the father, the proof was, that he had been reputed dead, and nobody had heard of him for 15 years last past. Upon an objection, that this last proof was insufficient, it was holden clearly by *Holt*, C. J. upon the perusal of the above statute, that this case was within it, because Lewis Davells, the lessor of the plaintiff, had a term in reversion in the lands, and so was a reversioner within the very letter of the statute; and he held, that a remainder man was within the equity of that law. *Holman v. Exton*, *Carth.* 246.]

[By the 6 *Ann.* c. 18. reciting that divers persons, as guardians and trustees for infants, husbands in right of their wives, and other persons having estates or interests determinable upon a life or lives, have continued to receive the rents and profits of such lands after the determination of their said particular estates or interests, it is enacted, "That any person claiming any estate in remainder, reversion, or expectancy after the death of any person within age, married woman, or any other person whomsoever, may, upon affidavit that he hath cause to believe that such person within age, &c. is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, once a year have an order from the great seal for the production of such person within age, &c., and upon the guardian, trustee, &c. refusing or neglecting to produce such infant, &c. agreeably to such order, the said infant, &c. shall be taken to be dead, and the remainder-man or reversioner shall enter upon

"the estate in like manner as if such infant, &c. were actually dead."]

Gillb. Evid. 271. H. P. C. 266. 2 H. H. P. C. 238. Law of Evid. 278. pl. 41. (a) If the woman appear to have endeavoured to conceal the death of such child,

By the 21 Jac. 1. c. 27. it is enacted, "That if any woman be delivered of an issue, which being born alive should, by the laws of this realm, be a bastard, and endeavour privately, either by drowning or secret burying, or any other way, either by herself or the procuring of others, so to (a) conceal the death thereof, as that it may not come to light, whether it were born alive, or not, but be concealed; in every (b) such case the mother so offending shall suffer death, as in case of murder, unless she can prove, by one witness at least, that such child was born dead."

there is no need of any proof, that it was born alive, or that there were any signs of hurt, for it shall be taken undeniably, that the child was born alive, and murdered. Kelynge, 32. — But where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the night following, she was adjudged not to be within the statute, because she knocked for help. Kelynge, 32. Neither is a woman within the statute, who, having confessed herself with child beforehand, is afterwards surprised and delivered, nobody being with her; and therefore in these cases it must appear by signs of hurt, or some other way, that the child was born alive. Kelynge, 33. 2 Hawk. P. C. c. 46. § 43. (b) But there is no need, in order to convict a woman by force of this statute, to draw the indictment specially, or to conclude it *contra formam statuti*; but it is the better way to set forth, that the defendant *infantem masculinum vivum parturit, qui quidem infans masculus adtunc & ibidem vivus existens natus per leges hujus regni Angliæ spurius fuit, Angliæ a bastard*, and then to go on in the ordinary form, to shew that she murdered him, &c. *contra pacem*, &c. for the statute doth not make a new offence, but only makes such a concealment an undeniable evidence of murder. Kelynge, 32. 2 Hawk. P. C. c. 46. § 43. See Observ. on the Statutes, 424, 425. 2d ed.

(I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

Show. Rep. 397. Carth. 220. Holt, 284. pl. 4. Salk. 181. pl. 9.

IT seems in regard to evidence to be an incontestible rule, that the party, who is to prove any fact, must do it by the highest evidence the nature of the thing is capable of.

As where the question was, whether the abbey *de Sentibus* was an inferior abbey, or not, *Dugdale's Monasticon Anglicanum* being produced for evidence was refused, because the original records might be had in the Augmentation-office.

2 Show. Rep. 163. pl. 152. [(c) But in

So, if a witness be to testify what another swore on a former trial, the record (c) of such trial must be produced, or his evidence is not to be admitted, &c.

such case it is not necessary to produce the original record, for copies of records, the journals of the House of Commons, the journals of parliament, parish registers, and the transfer-books of the East India Company, &c. are sufficient. Wherever an original is of a publick nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence. Dougl. 171. 503. 3 Salk. 154. By 5 G. 2. c. 30. § 41. which directs proceedings on commissions of bankrupt to be entered on record, true copies signed and attested as therein required, may be given in evidence.]

(K) Of Hearsay Evidence.

Moul. 183. Skin. 402. pl. 37.

IT seems agreed, that what another has been heard to say is no evidence, because the party was not on oath; also, because the party, who is affected thereby, had not an opportunity of cross-examining;

examining; but such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence.

Also, what a witness hath been heard to say at another time, may be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 Hawk. P. C. c. 46. § 14.

So, what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, either for (a) him or against him. 2 Hawk. P. C. c. 46. § 14.

[(a) The declarations of a prisoner cannot be given in evidence for him; therefore a witness for this purpose cannot be called in his defence; but he may cross-examine any of the witnesses on the part of the prosecution as to any thing they may have heard him say relating to the fact he is charged with. *Id. ibid.* 6 Ed.]

[Where positive proof cannot be had, the declarations of persons uninterested, and who are then dead, are admissible, as in questions concerning legitimacy, or in questions of pedigree. Bull. Ni. Pri. 294.

Hearsay is good evidence to prove the death of any person beyond sea. *Id. ibid.*

Hearsay is evidence in cases of settlement of paupers.

Rex v. Nutley,

3 Term Rep. 715. Rex v. Greenwich, *Id.* 716. Rex v. Holy Trinity in Warcham, Cald. 141.

It is evidence also, whether parcel or not parcel.

Davis v. Pearce,

2 Term Rep. 53. See Garnons v. Barnard, Antr. 299.

In questions of prescription, hearsay is good evidence in order to prove a general reputation. Bull. Ni. Pri. 295.

In a *quare impedit*, the plaintiff derived his title from Lord R. in whom he laid a presentation of one *Knight*: the bishop set up a title in himself, and traversed the seisin of Lord R.: the plaintiff gave in evidence an entry in the register of the diocese of the institution of *Knight*, in which there was a blank in the place where the patron's name is usually inserted, and then offered parol evidence of the general reputation of the country, that *Knight* was in by the presentation of Lord R.: upon a bill of exceptions, this came on in *K. B.* when the better opinion was, that the evidence was admissible, the register, which was the proper evidence, being silent; for a presentation may be by parol, and what so commences may be transmitted to posterity by parol, and that creates a general reputation. Bishop of Meath v. Lord Belfield, Bull. Ni. Pri. 295. 1 Willf. 215. S. C.

It seems to be no objection to the admission of hearsay evidence, that the party whose declarations are brought as hearsay evidence would not himself be an admissible witness, provided such declarations at the time were indifferent.] Espin. Ni. Pri. 787.

(L) Of the Party's Confession.

THE confession of the defendant himself, whether taken on an examination before justices of the peace, in pursuance of 1 & 2 P. & M. c. 13. or of 2 & 3 P. & M. c. 10. upon a bailment or commitment for felony, or taken by the common law on an examination

But for this vide 2 Hawk. P. C. c. 46. § 6.

examination before a magistrate for treason or other crime, or spoken in private discourse, has always been allowed to be given in evidence against the party, but not against others.

But wherever a man's confession is made use of against him, it must be taken all together, and not by parcels.

2 H. H. P.

C. 284.

Leach's

Cases, 286.

7. Burn's

Just. tit. Examination.

[The confession must be voluntary, not drawn from the accused by hope, or extorted by fear. If the confession be not reduced into writing, it cannot be used against the accused; and it is proper that he set his name or mark to it.

1 H. H. 585.

His examination ought not to be upon oath.

Leach's

Cases, 287.

Where the confession is regularly taken, it is of itself, uncorroborated by any other evidence, sufficient to convict the prisoner.]

(M) Of Similitude of Hands.

(a) 2 Hawk.
P. C. c. 46.

§ 15.

(b) 3 Stat.

Tri. 213.

216, 217.

226, 230.

(c) 3 Stat.

Tri. 752.

to 767.

(d) 1 W. &

M. c. 7. of

private acts.

(e) See

3 Stat. Tri.

892, 893.

4 Vol. 291, 292.

and Francia's trial.

Comparison of hands was held not to be good evidence in treason, unless the papers were found in the custody of the person himself, and not of another.

Skin. 579.

12 Mod. 72.

Ld. Raym. 40.

S. C. and *per Curiam*, it is not sufficient for the original foundation of an attainder, but may be well used as circumstantial evidence, if the fact be otherwise proved, as in my Lord Preston's case, his attempting to go with several treasonable papers into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands, was to run into the error of Colonel Sidney's case.

12 Mod. 72.

It is observable (a) that this, with other circumstances in (b) *Algernon Sidney's* case, was ruled to be good evidence of his having written a paper charged against him as an overt-act of high treason: yet in the trial of the (c) seven bishops, the court was divided in opinion, whether similitude of hands was evidence of the defendant's having signed the paper charged against them as a libel; and the parliament having declared an opinion in the (d) reversal of *Algernon Sidney's* attainder, that comparison of hands is no evidence of a man's hand-writing in criminal cases: it seems to have been generally holden (e) since that time, that it is not evidence in any criminal case, whether capital or not capital.

892, 893. 4 Vol. 291, 292. and Francia's trial. Comparison of hands was held not to be good evidence in treason, unless the papers were found in the custody of the person himself, and not of another. Skin. 579. 12 Mod. 72. Ld. Raym. 40. S. C. and *per Curiam*, it is not sufficient for the original foundation of an attainder, but may be well used as circumstantial evidence, if the fact be otherwise proved, as in my Lord Preston's case, his attempting to go with several treasonable papers into France, and principally where they were found on his person; but here, since they were found elsewhere, to convict on a similitude of hands, was to run into the error of Colonel Sidney's case. 12 Mod. 72.

(N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

Hardr. 22.

472. Bunb.

50. pl. 82.

91. pl. 148.

321. pl.

403.

9 Mod. 229.

Carth. 181.

Gilb. Evid. 62.

Prec. Ch. 212.

Theo. Evid. 30.

12 Vin. Abr. 113.

pl. 45. 47.

Vern. 413.

pl. 390.

Eq. Caf. Abr. 227.

pl. 3.

Atk. Rep. 204.

(f) But if a witness is examined in Chancery, you may read, without an order, any other depositions of the same person, in the spiritual court, or elsewhere, in any other cause, so as you make use of them only to confront the evidence he then gives. Anon. Mosely, 118. 188.

Depositions cannot be given in evidence against any person who was not party to the suit; (f) and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party.

12 Vin. Abr. 113. pl. 45. 47. Vern. 413. pl. 390. Eq. Caf. Abr. 227. pl. 3. Atk. Rep. 204. (f) But if a witness is examined in Chancery, you may read, without an order, any other depositions of the same person, in the spiritual court, or elsewhere, in any other cause, so as you make use of them only to confront the evidence he then gives. Anon. Mosely, 118. 188.

Excommunication.

EXcommunication is the highest ecclesiastical censure which can be pronounced by a spiritual judge against a christian, for thereby he is (a) excluded from the body of the church, and disabled to bring any action, or sue any person in the common law courts.

Co.Lit.133.
Godolp. Re-
pert. 624.
(a) By the
33d of the
Articles of
the Church

of England, that person, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken by the whole multitude of the faithful as an heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto. Gib. Cod. 1095-6. — It was used by way of punishment only for great and heinous crimes, according to the rule in the *Reformatio Legum*, fol. 80. *Non debet excommunicatio minui- tis in delictis versari, sed ad horribilium criminum atrocitatem admoveenda est, in quibus ecclesia gravissimam infamiam sustinet, vel quod illis evertatur religio, vel quod boni mores pervertantur.* But now the frequent use of excommunication is in cases of contumacy, for not appearing or disobeying sentences, though in the smallest matters, and those oft-times of a civil nature, which is one of the principal means of bringing a contempt upon it, and yet is the only way which the spiritual court hath to enforce obedience. Gib. Cod. 1095.

Excommunication is divided into the greater and less; the greater excludes a man from the communion of the faithful, as well as of the sacraments; the less excludes him from the communion of the sacraments only; but they both equally disable him from bringing any action, &c.

Co.Lit.134.

Under this head we shall consider,

- (A) In what Cases the Spiritual Court may properly excommunicate.
- (B) In what Cases a Person shall be said to be *ipso facto* excommunicated.
- (C) By whom Excommunication is to be pronounced and certified.
- (D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein, of his Disability to bring any Action.
- (E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law, and by virtue of the Statute 5 *Eliz. c. 23*.
- (F) Of Absolving and Absolving a Person excommunicate.

(A) In what Cases the Spiritual Court may properly excommunicate.

Roll. Abr.
883.

12 Co. 76.

(a) That
anciently
the king's

tenants who held in *capite*, and whose attendance was necessary on the person of the king, could not be excommunicated. 2 Inst. 631. Gibf. Cod. 1102. — That a bishop, or other peer of parliament, may be excommunicated. 7 Mod. 56. &c. The Bishop of St. David's case.

Salk. 293.

pl. 1. 350.

pl. 7. Ld.

Raym. 586.

618. Gibf.

Cod. 1097.

Also it seems, that at common law, the *significavit* of an excommunication might be upon a general cause, as *propter contumaciam*, or *de non parendis mandatis ecclesiæ*; but now by the 5 Eliz. c. 23. the cause must be set forth in the writ *de excommunicato capiendo* itself, because by that statute the writ is made returnable in *B. R.* which would be to no purpose if the cause were not set forth in the writ, so as to enable the court to judge thereof.

14 H. 4.

14. b.

Roll. Abr.

883.

(b) And

therefore

the court of

Chancery, for any defect in the certificate, used to grant a *superfedeas*; but before the 5 Eliz. c. 23. there were no discharges in *B. R.* on *excommunicato capiendo*, but where a man was excommunicated pending a prohibition. Salk. 293. pl. 1.

Roll. Abr.

884. Ster-

ling's case.

Roll. Rep.

174. S. C.

(c) The de-

fendant was

If the excommunication appears to have been by an archdeacon of a peculiar or limited jurisdiction, it ought to appear by the certificate, either expressly, or by implication, that the matter thereof arose (c) within his (d) jurisdiction; otherwise it is void.

taken upon a *capias excommunicatum*, and because it was not mentioned in the *significavit*, that he lived in that diocese at the time of the excommunication; it was therefore adjudged to be uncertain, and the party was discharged. Moor, 467. Beaumont's case. Show. Rep. 17. S. C. cited. Godb. 191. S. P. (d) The defendant was taken upon a *capias excommunicatum*, and the *significavit* was, that he was excommunicated for not answering articles; but it not being shewn what these articles were; it was adjudged ill. Roll. Rep. 136. Fox's case. — If a man is excommunicated for an offence, which is pardoned by a general pardon, and this being shewn to the bishop, he notwithstanding refuses to absolve him, an action on the case lieth against him. 12 Co. 76.

Salk. 293.

pl. 1. The

King and

Fowler, ad-

judged upon

such a re-

turn to a

babeas cor-

pus.

[(c) Secus, if

it had been the conjunctive *et*. 2 Atk. 499. Rex v. Turfoot, Ca. temp. Hardw. 314.]

If the excommunication in a writ of *excommunicato capiendo* is recited to be *pro quibusdam causis subtractionis decimarum sive (e) aliorum jurium ecclesiasticorum*; this is too uncertain, for the *alia jura* might be such matters as were out of their jurisdiction, and they ought to shew the matter was within their jurisdiction; for of that the king's courts are to be judges, and not they themselves.

So, where in a writ of *excommunicato capiendo*, the recital of the *significavit* was, that he was excommunicated for not paying the costs in *quodam negotio puerorum educationis sive instructionis sine aliquâ licentiâ in eâ parte prius obtentâ*; the writ was quashed for uncertainty, because it might be a teaching to fence or dance, and not letters.

There was a presentment in the spiritual court of the Bishop of Ely against the defendant for teaching school* in Cambridge without a licence, by the churchwardens of the parish; whereupon, as the way was there, a citation was fixed up at the church door, for the defendant to come in and answer the charge of the presentment; but he, being a dissenter, and not coming to church, had no notice of the citation; and for his contempt in not coming, he was excommunicated; whereupon he applied to the bishop to get himself absolved, for that it was a writing-school he taught, and so not within the bishop's jurisdiction; but the court refused to absolve him, unless he would put in caution to answer such articles, and abide by such sentence, as they should make thereupon; which he was advised not to do, because that would be owning their jurisdiction, and concluding himself to abide by their sentence, and thereupon he moved for a prohibition, and had it, with a special clause to absolve him. Mr. Page moved for the prohibition, and insisted, that they could not excommunicate any one for contempt, without shewing that the matter itself was within their jurisdiction; and as they could not excommunicate for the original matter, if it were not within their jurisdiction, so neither could they for a contempt to a citation upon that matter; and cited 8 Co. 68. *Trollop's case, Doctor and Student*. 12 Co. 77. 14 H. 4. 14. 5 Co. 23. And he said, by these books it appears, that, if the bishop refused to absolve him, an action on the case would lie against him; but now-a-days, a prohibition was thought the better way; and he said, this presentment being only for teaching school, they could not come after with articles, and charge him with any other matter, as a writing school, Latin school, or other particular school; which the court agreed, and said it was like a presentment by a grand jury here, which cannot be altered or changed by articles after; and as the grand jury are upon their oath, so are the churchwardens there; and said, that when articles are given in against any one, the citation ought to be founded upon them; but when it was by presentment, that was a charge and a citation itself, and cannot be after altered by articles; though Serjeant Parker said, he thought this presentment to be only in the nature of a summons, and that it was necessary articles should be drawn up against him after, to charge upon the particulars; but the prohibition with the said clause was granted.

[If the writ is in a suit *pro correctione morum*, it is too general. So, for not appearing to answer *certis articulis animæ suæ salutem, morumque correctionem concernentibus*.

If it is for *slander or defamation*, it is certain enough.

Salk. 294.
pl. 2. The
Queen v.
Hill, 2 Ld.
Raym. 818.
1415.

Pasch.
6 Ann. The
Queen and
Bentley.
* None shall
keep a
school-
master, or
teach school,
without the
bishop's li-
cence, 23 El.
c. 1. § 6 &
7. 1 Jac. 1.
c. 4. § 9.
13 & 14
Car. 2.
c. 4. § 11.

† For the
causes in
which an
*excommuni-
cato capi-
endo* may be
awarded on
the statute,
vide stat.
5 Eliz.
c. 23. § 13.

Rex v.
Thead,
1 Str. 43.
Rex v. Munnery, *Id.* 76.

Rex v. Keat,
2 Str. 950.

Rex v. Eyre,
2 Str. 1067.

Two *significavit*s were quashed, being only said to be in a cause which came by appeal in a matter merely spiritual. For by Lord Talbot, we are not to lend our assistance, but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual. In *Fowler's case*, it was in causes of ecclesiastical rights, and held not sufficient.]

(B) In what Cases a Person shall be said to be *ipso facto* excommunicated.

(a) For the
causes of
excommu-
nication

BY several (a) acts of parliament, offenders of several kinds are made to incur the punishment of excommunication *ipso facto*.

ipso facto, according to the constitutions and canons ecclesiastical of the church of England, *vide* Godolph. Report. 529, 630.

[By 27 G. 3.

c. 44. no
suit shall be
commenced
in any ec-
clesiastical
court for
striking or
brawling in
any church
or church-
yard after
the expiration

of eight calendar months from the commission of the offence.]

And to this purpose it is enacted by 6 E. 6. c. 4. "That if any person whatsoever shall, by words only, quarrel, chide, or brawl in any church or church-yard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending, that is to say, if he be a layman *ab ingressu ecclesie*; and if he be a clerk, from the ministration of his office for so long time as the same ordinary shall by his discretion think meet and convenient, according to the fault."

And it is further enacted by the said statute, "That if any person shall smite or lay any violent hands upon any other, either in any church or church-yard, that then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon, in any church or church-yard, or shall draw any weapon in any church or church-yard, to the intent to strike another with the same weapon, that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses before justices of assize, justices of oyer and terminer, or justices of peace in their sessions, by force of this act, shall be adjudged by the same justices, before whom such person shall be convicted, to have one of his ears cut off, &c. and besides that, every such person to be and stand *ipso facto* excommunicated, as aforesaid."

In the construction hereof the following opinions have been holden:

Cro Eliz.
224.

1. That the statute extends as well to cathedral as parochial churches and church-yards.

Dyer, 275.
pl. 48.
Lit. Rep.

That notwithstanding the words of the statute be expressed, That he who smites another in the church (b), &c. shall *ipso facto* be

be deemed excommunicate; yet there ought either to be a precedent conviction at law, which must be transmitted to the ordinary, or the excommunication must be declared in the spiritual court, upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof till he be found guilty upon a lawful trial: also, it must be intended, in the construction of this statute, that the excommunication ought to appear judicially; for otherwise there could be no abolition.

at law is not necessary, though if there is one, the ordinary may use it as a proof of the fact. For with respect to this, and the first offence in the act, the statute, though it provides a penalty, does not change the jurisdiction. As to the last offence, *malicious striking with any weapon*, &c. there must be a previous conviction, and a transmission of the sentence, and a declaration. *Wilson v. Greaves*, 1 Burr. 240. *Wenmouth v. Collins*, 2 Ld. Raym. 850.]

That when the proceedings for the offences against this statute are in the spiritual court, costs may be given *pro expensis litis*, but not *pro damnis*.

That he who strikes another in a church, &c. can no way excuse himself, by shewing that the other assaulted him.

That (c) churchwardens who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.

S. C. (c) Or perhaps private persons. 1 Hawk. P. C.

That if the proceeding be in the temporal courts, by way of indictment, for drawing a weapon in the church, &c. and it conclude *contra formam statuti*, it must be laid to be, with an intent to strike such a person; for being laid to be *contra formam statuti*, the jury cannot inquire of any other offence than that which comes within the description of the act.

That in an indictment upon this statute, for striking in the church, in order to bring the offender within the latter clause of the statute, which subjects him to the loss of an ear, &c. it must be shewn that the striking was with a weapon.

So, it hath been holden, that if a man take up a stone in the church-yard, and offer to throw it at another, or having a hatchet or ax in his hand offer to strike another therewith, that this is not an offence within this part of the statute; for there are not such weapons as may properly be said to be drawn, as a sword, dagger, &c.

Also, two persons committed to prison by certain justices of the peace for disturbing a minister in his office, were discharged upon a *habeas corpus*, by the court of King's Bench, for that their commitment was too general, not shewing wherein they disturbed, but only that they *per apertum factum* disturbed, &c. not shewing the particular fact whereby they did disturb, viz. by brawling, fighting, or otherwise, there being several punishments to each; but the court bound them to their good behaviour for a year.

149. Hett.
86. Cro.
Eliz. 919.
Vent. 146.
[(b) For
this second
offence in
the act,
striking in a
church-yard,
a precedent
conviction

at law is not necessary, though if there is one, the ordinary may use it as a proof of the fact. For with respect to this, and the first offence in the act, the statute, though it provides a penalty, does not change the jurisdiction. As to the last offence, *malicious striking with any weapon*, &c. there must be a previous conviction, and a transmission of the sentence, and a declaration. *Wilson v. Greaves*, 1 Burr. 240. *Wenmouth v. Collins*, 2 Ld. Raym. 850.]

Cro. Jac.
462. Hett.
86. S. P.
1 Burr. 244.

Cro. Jac.
367.

Saund. 13.
Hawe v.
Planner.
2 Keb. 124.
Lev. 196.
Sid. 301.
Mod. 168.
c. 63. § 29.

Cro. Eliz.
231. Pen-
hall's case.
4 Leon. 49.
Noy, 171.
S. C.

Cro. Eliz.
464.

Dalton's
Justice,
c. 23. f. 49.
said to have
been so
holden by
two justices.
Comp. Incumb. 347. cited.

3 Keb. 203.
Rex v.
Nicols and
Robins.
Comp. In-
cumb. 347.
S. C. cited.

By

By the 3 Jac. 1. c. 5. § 11 and 12. it is enacted, " That every
 " popishi recusant convict shall stand to all intents and purposes
 " disabled, as a person lawfully excommunicated, and as if such
 " person had been so denounced and excommunicated according
 " to the laws of this realm, until he or she shall conform, &c.
 " and that every person sued by such person so disabled, may plead
 " the same in disabling of such plaintiff, as if he or she were ex-
 " communicated by sentence in the ecclesiastical court, except the
 " action of such recusant do concern some hereditament or lease,
 " which is not to be seized into the king's hands, by force of
 " some law concerning recusancy."

In the exposition hereof it hath been holden,

1. That a plea in disability, pursuant to this statute, ought to
 shew before what justices the conviction was, that the court may
 know where to send for a certificate thereof, if it be denied; and
 that the record itself, or at least a certificate thereof, ought im-
 mediately to be produced.

2. That if after such a plea it be certified, that the plaintiff
 have conformed, and thereupon the defendant be ordered to plead
 in chief, and then the plaintiff relapse and be convicted again, the
 defendant cannot plead the same in disability a second time *.

the plaintiff hath by his own act rendered himself incapable?

3. That it must appear, either from the conviction itself or by
 proper averments, that the plaintiff is convicted of popish recu-
 sancy, because no recusants, except popish ones, are within the
 said clause; but this is sufficiently set forth, by alleging, that the
 plaintiff being *papalis recusans* was indicted and convicted *secundum
 formam statuti*, &c.

Also it is holden by (a) some, that all popish recusants convict
 may be taken up by the writ *de excommunicato capiendo*, and that
 they are not to be admitted as competent witnesses in any cause;
 but by (b) *Hawkins*, this seems to be a construction over-severe;
 for inasmuch as this, like all other penal statutes, ought to be
 construed strictly, and the words thereof are no more than that
 such persons shall stand disabled, &c. as persons lawfully excom-
 municate, &c. and the purport thereof may be fully satisfied by
 the disability to bring any action; it seems to be too rigorous to
 carry them farther.

By the 25 E. 1. c. 4. it is enacted, " That all archbishops and
 " bishops shall pronounce the sentence of excommunication against
 " all those that by word, deed, or counsel, do contrary to the char-
 " ters of *Magna Charta*, or that in any point break or undo
 " them; and that the said curses be twice a year denounced and
 " published by the prelates aforesaid."

Noy, 87.

Latch. 176.

3 Lev. 333,

4.

Hetl. 176.

* Why not
 in the na-
 ture of a
 plea, after
 the last con-
 tinuance, if

3 Lev. 333,
 &c.

(a) 2 Bulst.
 155.

(b) Hawk.
 P. C. c. 12.
 § 6.

But for this
 vide Gibb.
 Cod. 1098.

(C) By whom Excommunication is to be pronounced and certified.

THE sentence of excommunication can only be pronounced by the bishop, or other person in holy orders, being a master of arts at least: also, the priest's name pronouncing such sentence is to be expressed in the instrument issuing under seal out of the court.

Excommunication must be certified by the bishop of the diocese, whose proper subject the party is, and cannot be certified by his commissary (a) or official; the reason whereof, according to the (b) civilians, is, because no person inferior to a bishop can call in the secular arm, by the laws of the church; but my Lord (c) *Coke* assigns the reason of it to be, because no certificate of excommunication by any shall disable one, but the certificate of him to whom the court may write to absolve the party excommunicated.

fary might certify excommunication; and that he was restrained by parliament.] (b) *Lindw. de Sent.* Ex Gibf. Cod. 1097. (c) 8 Co. 68.

But the vicar general, *episcopo in remotis agente*, or the guardian of the spiritualities, *vacante sede*, may do it, (d) either by direct certificate, that the person is excommunicate, or by letters testimonial, reciting the entry thereof in the register, and attesting that such entry is there found.

[And although the bishop be in his diocese, yet the certificate of the vicar general, by his letters unto the Chancery, reciting that the bishop is *in remotis agend.*, is good, and shall not be traversed.]

So, a parson excommunicated by a commissary, official or archdeacon, who derive their jurisdiction from the bishop, may be certified excommunicated by the bishop himself (e).

[(e) But in this case the rule in the register is, that the excommunication must be said in the writ to be by the authority of the bishop himself.]

Also, the bishop, after election, though before consecration, may certify excommunication.

[The chancellor of the university of *Oxford* may certify excommunication of persons within his jurisdiction.

Whether the court of delegates have power to excommunicate, (though adopted in more modern practice,) hath formerly occasioned a difference of opinion.]

In times of popery, excommungement certified by the pope, or delegates commissioned by him, did not disable the plaintiff to sue, &c. because the courts had no person to whom they could write to have him absolved.

The court will not receive the certificate of excommunication of one bishop from another, because they must have the certificate from the bishop whose proper subject the party was; and he might have been absolved by his own ordinary, after the first certificate to the bishop.

Gibf. Cod.
1095.

Co. Lit. 133.
Roll. Abr.
384.
[(a) By the
ancient
common
law, as was
said by
Hankford,
11 H. 4.
64. a.
a commissary]

Co. Lit. 133.
F. N. B.
62. N.
(d) Vern.
222. 3 Keb.
60. 69.

F. N. B.
62. N.

8 Co. 63.
Roll. Abr.
434.
Reg. 65.

F. N. B.
62. N.

F. N. B.
64. C.

2 Bulstr. 4.
2 Roll. Abr.
233.
Lutw. 17.

16 E. 3. 31.
14 H. 4. 14.
Roll. Abr.
583.

8 Co. 63.
F. N. B.
65. A.

Bro. Excom. 21. Nor will they receive a certificate of a bishop deceased, because he may stand assailed by the present ordinary that now is, after the decease of the bishop who has certified; and the court will not (a) receive any certificate but from such person to whom they can write to assail.

Co. Lit. 134. [But when the bishop hath certified the excommunication under seal, his death will not vacate the certificate.]

3 Co. 63. The certificate ought to be directed, either to the court, or at least *universis S. Matris ecclesie filiis*, and (b) ought to contain the day of the excommunication, [that is, the day on which the excommunication was published in the church, for the writ *de excommunicato capiendo* cannot be awarded till the party hath lain under the sentence forty days (c), which are to be reckoned from that day.

[(b) For within forty days it was competent to him to appeal to the court of Rome, and the appeal would operate as a *superfedeas* to the process, and liberate the party. 20 H. 6. 25. a. b.]

F. N. B. The certificate must signify, that the person was excommunicated by special name, and in a special suit against him *ex officio*, or by the party; for otherwise he doth not incur the sentence of the greater excommunication.

Rex v. Burrard, 1 P. Wms. 435. The defendant was excommunicated for not paying his proportion of a rate made for repairing the church of *D. in Suffolk*. It was moved to supersede the writ, 1st, For that it was not shewn that the defendant was commorant within the diocese at the time of the excommunication pronounced, *Moor* 467. Sir T. Jones 89. 2dly, Because there was no addition of the defendant in the writ. On the other side it was answered, (as to the first objection) that the defendant in the libel was said to be of *D. in Suffolk*, which was the same parish where the church was, and it should not be intended that, after the libel, he removed from thence: but if he did remove, his flying from the process of the court should not mend his case, for then the party, by his own act, and by turning his back upon justice, might avoid such proceedings. As to the want of addition, this was said to be only necessary in the causes of excommunication mentioned in the statute of 5 Eliz. c. 23. for which reason it was true, that for want of addition, there could be no proceeding against him by way of proclamation with pains and penalties for not appearing; but still as the matter was plainly of ecclesiastical cognizance, (*viz.*) the repairing of the church, the excommunication was good, and so was *Cro. Car.* 196. *Hughes's case*, T. Jones 89. The inhabitants of *Bermondsey*, 1 Show. 16. *Johnson's case*, 1 Salk. 293. The king v. *Fowler*.—The chancellor disallowed both the exceptions.

Dr. Trebec v. Keith, 2 Atk. 498. Mr. Keith, minister of *May-fair chapel*, which was a chapel of ease to *St. George's parish, Hanover-square*, of which the plaintiff was rector, being cited into the bishop of *London's court* for officiating as a clergyman of the church of *England* without being licensed by the bishop, and having been denounced excommunicate forty days, for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into Chancery, the writ of *significavit* issued,

issued, which it was moved to quash.—Lord *Hardwicke* Chancellor.—This is a case of as great consequence to the good government and discipline of the church as can possibly happen. I can take notice of nothing but what appears on the *significavit*(a); and the question before me is, whether there is sufficient to warrant the court to issue the writ of *excommunicato capiendo*? Now, if this gentleman is out of the jurisdiction, he is not without remedy, for he may go to a court of common law after sentence, as well as before. The first and material exception is, that the particular cause of the excommunication ought to be set forth. It is not necessary for the ecclesiastical court to shew they have rightly proceeded; for if they have not, you have a remedy by appealing to higher ecclesiastical jurisdiction. Here is certainly a description of the principal cause, and if some of the matters mentioned are within the jurisdiction, it is sufficient. It is not like the case of *The King and Fowler*, which was held uncertain, as it was in the disjunctive, *tithes or other ecclesiastical dues*, so that it might be ecclesiastical dues only: if it had been *tithes AND other ecclesiastical dues*, it would have been well enough. As to preaching, there is no pretence for his doing it without licence from the bishop: the same as to the administration of the sacrament, and celebration of marriage; for the canons of 1603, confirmed by act of parliament, are express as to that matter. Here, the ground of the contumacy is described specially, which is more than is necessary; for where the cause is sufficient it may be set forth generally. The second exception is, that it is not mentioned in what manner *Keith* officiated, or performed divine service, and therefore it might be in his own house, or a private chapel. But the word *officiating* ought not to be so construed; for reading prayers or a sermon in a private family, is not performing divine service. *Divine service* is the expression made use of in several acts of parliament, particularly in the act of uniformity, 13 & 14 Car. 2. c. 4. § 27. relating to the service in *Wells*: in several other acts of parliament that direct the reading of proclamations, the order is, that it be read after divine service. The word *officiate* relates to his office as a presbyter, which must mean his doing it in a publick manner. It is not indeed necessary for a minister to have a licence from the bishop of the diocese for every particular case, but yet the bishop may suspend him wholly where he is irregular, till he submits to perform his duty properly: and it is not here a description of the case, but of the contempt only, for which he has excommunicated him. The fourth exception is, That it is not said at the time of the excommunication he officiated within the diocese of *London*, and therefore has been cited out of the diocese contrary to the statute of 23 H. 8. c. 9. It is not averred, indeed, that he was resident in the diocese at the time of the excommunication pronounced, but being said in the libel to be in the diocese, I will not presume he was not commorant when the monition issued; and to this purpose the case of *The King v. Burrard*, 1 P. Wms. 435. was properly cited. There is another answer to this objection; that a man may be resident in one diocese, and come into another and commit

(a) The word *significavit* is here used to denote the bishop's certificate. It is sometimes used to denote the writ *de excommunicato capiendo* itself. In this latter sense it seemeth to be more properly applied; the writ having received its name from this same word in the beginning of it. *Significavit nobis venerabilis pater N. &c.*

The third exception was, that it is not said he has performed divine service since the monition. But to this his Lordship is not reported to have spoken.

the offence charged upon him in the *significavit*, and this, for the purpose of being cited, is a residence sufficient, and he may be presented in the diocese where he committed the offence; and unless he was so considered, there would be no remedy. See Dr. *Blackmore's* case in *Hardr.* 421. The fifth exception is, That he, who pronounced the sentence of excommunication, is not said to be a person in holy orders. The averment in the *significavit* is sufficient, for the words are, *a person lawfully authorized*, which take in the capacity of the person doing it. The sixth exception is, That it doth not appear when the excommunication was pronounced. Now, the *significavit* only avers, that he continued contumacious, but the *terminus a quo*, and the *terminus ad quem*, are never set forth. The last exception was, That Mr. *Keith* is within the toleration act, the 1st *W. & M. c.* 18. The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England*, who act contrary to the rules and discipline of the church, would introduce the utmost confusion. All the exceptions therefore must be over-ruled.]

(D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein of his Disability to bring any Action.

A Person excommunicated is thereby disabled to (a) be a witness in any cause, cannot be attorney or procurator for another, is to be turned out of church by the churchwardens, and not to be allowed christian burial.

Gibb. Cod. 435. 1096-7.
(a) But such a person is entitled to the benefit of clergy. Bro. Clergy, 20.—And may contract marriage. . Godolph. Repert. 626.

An excommunicate person is disabled to sue or commence any action; but such disability cannot be pleaded (b) after a general imparlance, for thereby the defendant admits him a good plaintiff.

9 E. 4. 36.
Co. Lit. 133.
8 Co. 63.
Roll. Abr. 883.
(b) Placita Gen. 10. Latch. 179. Lutw. 19. See tit. Abatement, vol. i. p. 4. 5.

When excommunication is pleaded, the bishop's letter under his seal, witnessing the excommunication, must be shewn; and though the plaintiff cannot deny the plea, yet the writ shall not abate, but the defendant *eat inde sine die*, because the plaintiff, upon producing his letters of absolution, shall have a re-summmons or re-attachment.

Lit. § 207.
8 Co. 69.
Co. Lit. 134.
3 Lev. 208.
240.

If in an appeal of murder, &c. the defendant pleads excommunication in the plaintiff in disability, the appellee shall be bailed until the plaintiff purchases letters of absolution, and then he must plead in chief; for if the defendant should be kept in prison till the plaintiff be absolved, he might be a prisoner for life.

3 Affice, pl. 12.
2 Hawk.
P. C. 114.

Excommunication is a good plea to an executor or administrator, though they sue *in auter droit*, for an excommunicate person is excluded from the body of the church, and incapable to lay out the goods of the deceased to pious uses: besides, it is one of the effects of excommunication, that he cannot be a procurator or attorney for any other person, and therefore cannot represent the deceased (a).

43 E. 3. 13.
Co. Lit. 134.
Theol. 11.
[(a) But an excommunicated person may be appointed executor, and is capa-

ble of a legacy: for the sentence will not annul the executorship, or quite destroy the action; but only suspend it till absolution God. O. L. 37, 38. Swinb. 367.]

Excommunication is no plea on a *qui tam*, because it is for example; and the statute having given the informer an ability to sue, and not excepted excommunicated persons from the liberty of informing, he is enabled to sue by the statute, notwithstanding the censures of the church.

When a prohibition is brought against the bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause of such excommunication shewn; this is no good plea; for, in such case, it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions, and the plea of excommunication in this case is *exceptio ejusdem rei cujus petitur dissolutio*.

If an action be brought by the bailiffs and commonalty of a corporation, the defendant shall not plead excommunication in the bailiffs, because they sue as a corporation, and a corporation cannot be excluded from the communion of the visible church.

When excommunication is pleaded in the plaintiff, he shall not reply, that he has appealed from the sentence, for the sentence is in force until it is repealed; and whilst it is in force, he cannot appear in any of the courts of justice; but he may reply, he is absolved; for then his disability is taken away.

[A party in custody on an *excommunicato capiendo* is entitled to the benefit of the rules.]

28 E. 3. 97.
30 E. 3. 15.
Co. Lit. 134.

Bro. Excommunication
3.
3 Bullst. 72.
20 H. 6. 25
Placita Gen.
10. 72.
Rex v.
Buckland,
1 Str. 413.

(E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law and by virtue of the Statute 5 Eliz. c. 23.

IT is said, that the writ *de excommunicato capiendo* is a liberty or privilege peculiar to the church of England, above all the realms in Christendom; for though the assistance of the secular arm hath ever been afforded to the church in most other christian countries as well as this, yet in no instance is it perhaps so surely and so effectually reached out, as by the execution of this writ, which is (a) *debitum justitiæ*, and not made to depend upon the pleasure of the prince.

Gibb. Cod.
1102. cited
from Dr.
Crisp's
Apol. fol. 8.
(a) But in
2 Inst. 623.
631 it is
expressly
said, that

breve regis de excommunicato capiendo de gratiâ regis procedit.

Fitz. N. B.
240.
Salk. 293.
pl. 1.

The writ of *excommunicato capiendo* issues out of Chancery, and is founded on the bishop's certificate, signifying the excommunication, and at common law was only returnable into that court; so that for any uncertainty or defect in the writ, the party could only be discharged in Chancery.

But now by the 5 *Eliz. c. 23.* intituled, *An act for the due execution of the writ de excommunicato capiendo*, reciting, "Forasmuch as divers persons offending in many great crimes and offences, appertaining merely to the jurisdiction and determination of the ecclesiastical courts and judges of this realm, are many times unpunished for lack and want of the good and due execution of the writ *de excommunicato capiendo*, directed to the sheriff of any county, for the taking and apprehending of any such offenders, the great abuse whereof, as it should seem, hath grown, for that the said writ is not returnable in any court that might have the judgment of the well executing and serving the said writ, according to the contents thereof; but hitherto hath been left only to the discretion of the sheriffs and their deputies, by whose negligence and defaults for the most part the said writ is not executed upon the offenders as it ought to be, by reason whereof such offenders be greatly encouraged to continue their sinful and criminous life, much to the displeasure of Almighty God, and to the great contempt of the ecclesiastical laws of this realm :

"2. Wherefore, it is enacted, That every writ of *excommunicato capiendo*, that shall be granted and awarded out of the high court of Chancery against any person or persons within the realm of *England*, shall be made in the time of term, and returnable before the queen's highness, her heirs and successors, in the court commonly called the King's Bench, in the term next after the *teste* of the same writ, and the same writ shall be made to contain, at the least, twenty days between the *teste* and the return thereof; and after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said court of King's Bench, and there, in the presence of the justices, shall be opened and (a) delivered of (b) record to the sheriff or other officer (c), to whom the serving and execution thereof shall appertain, or to his or their deputy or deputies; and if afterwards it shall or may appear to the justices of the same court for the time being, that the same writ so delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been used or had in the not well serving and executing of the said writ, that then the justices of the said court shall and may, by authority of this act, assess such amercement upon the said sheriff or other officer, in whom such default shall appear, as to the discretion of the said justices shall be thought meet and convenient; which amercement so assessed shall be estreated into the court of Exchequer as other amercements have been used.

(a) That the precise form of the statute must herein be observed, and that the writ must be brought and openly delivered in court. Cro. Jac. 567.
(b) That the writ must be enrolled and delivered to the sheriff in convenient time; Cro. Car. 583. *Packer's case*. Vent. 338. S. P. and the prisoner may be discharged on motion, as well as by pleading this matter, at the return of the *habeas corpus*, &c.
vide Sid. 285.—But where for such a fault the court refused to discharge the prisoners, or to bail them, because they were dangerous persons, and refused to take the oath of allegiance, *vide* Sid. 165. Also,

Also, upon the construction of this clause of the statute, it hath been holden, 1. That one taken on a writ of *excommunicato capiendo* cannot come into B. R. but by *habere corpus*; and if he be brought in before the writ is returnable, he shall not be allowed to plead, or move to quash the writ. 2. The writ of *excommunicato capiendo* recites the *significant* which is in Chancery, but the writ is brought into B. R. and is enrolled there before it goes to the sheriff, which enrolment is to inform the court, that at the return of the *excommunicato capiendo* they may award further process, as the case requires. 3. If by the recital of the *significant* it appears, that there was no cause for the writ, the court of King's Bench may quash it, and the court of Chancery cannot, though the *significant* be there. Salk. 294. pl. 3. [It was formerly doubted, whether after the writ had been issued out of Chancery, and brought into the court of B. R., and there delivered to the sheriff, but not actually returned into B. R., the court of Chancery, on a plain error appearing, could supersede it. *Rex v. Burrard*, 1 P. Wms. 435. But it was determined by Lord Hardwicke, that after the return of the writ is out, the court of Chancery cannot, on a petition to quash the writ, do any thing in it, as they have no authority; for the court of B. R. have the cognizance of it, and they can compel the sheriff to return it, and the application to quash it must be to them. If indeed the writ issue in the vacation, and be not yet returnable, (for it must be returned on one of the return days in the term,) the court of Chancery will give relief and discharge the party out of custody. *Ex parte Little*, 3 Atk. 479. But if the writ issued from the court of Chancery be opened and enrolled in B. R., and on exceptions taken, a rule be made for the prosecutor to shew cause why the delivery of the writ to the sheriff should not be staid, and before that can be done, the return be out, another writ may be sued out from Chancery, but not from B. R. *Rex v. Eyre*, 2 Str. 1189. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it superseded; for the court said, they could judge of it by the entry, and since it appeared the defendant could not be legally detained upon it, if he was taken, it was proper to supersede it, to prevent him from being restrained of his liberty contrary to law: that the intent of this statute in directing the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit*, and they were not to wait till the return, till all the inconveniencies, which they should have prevented by not issuing the writ, had happened. *Rex v. Theed*, 1 Str. 45. 10 Mod. 350. S. C. (c) The words "*other officers*" in the statute mean bailiffs or liberties or the coroner, who is the proper officer to execute process, where the sheriff is incapacitated: therefore, if one who is a prisoner in the Fleet be excommunicated, the court of Chancery cannot order the custitor to direct the writ of *excommunicato capiendo* to the warden of the Fleet, the same being a *custumial* writ; but the writ must be directed to the sheriff, who may return a *non est inventus* into the King's Bench, upon which return the court will grant a *habeas corpus* to bring up the prisoner, and there charge him with an *excommunicato capiendo*. *Strudwicke's case*, 3 P. Wms. 53.]

" 3. It is further enacted, 'That the sheriff, or other officer, to whom such writ of *excommunicato capiendo*, or other process by virtue of this act shall be directed, shall not in anywise be compelled to bring the body of such person or persons as shall be named in the said writ or process into the said court of King's Bench, at the day of the return thereof, but shall only return the same writ and process thither, with declaration briefly, how and in what manner he hath served and executed the same, to the intent that thereupon the said justices may then further proceed, according to the tenor and effect of this present act.

" 4. And if the sheriff or other officer, to whom the execution of the said writ shall so appertain, do or shall return, that the party or parties named in the said writ cannot be found within his bailiwick, that then the said justices of the King's Bench for the time being, upon every such return, shall award one writ of *capias* against the said person or persons named in the said writ of *excommunicato capiendo*, returnable in the same court in the term-time, two months at least next after the *teste* thereof, with a proclamation to be contained within the said writ of *capias*, that the sheriff, or other officers, to whom the said writ shall be directed in the full county-court, or else at the general assizes or gaol delivery to be holden within the said county, or at a quarter sessions to be holden before the justices of the peace within the said county, shall make open proclamation, ten days at least before the return, that the party or parties named in the

“ said writ shall, within six days next after such proclamation, yield his or their body or bodies to the prison of the said sheriff, or other such officer, there to remain as a prisoner, according to the tenor or effect of the first writ of *excommunicato capiendo*, upon pain of forfeiture of ten pounds; and thereupon after such proclamation had, and the said six days past and expired, then the said sheriff or other officer, to whom the said *capias* shall be directed, shall make return of the same writ of *capias* into the said court of the King’s Bench of all that he hath done in the execution thereof, and whether the party named in the said writ have yielded his body to prison, or not.

(a) This statute doth not take away or affect the *excommunicato capi-*
endo at common law, but in the particular cases therein mentioned gives a greater pe-

“ 5. And if upon the return of the said sheriff it shall appear, that the party or parties named in the said writ of *capias*, or any of them, have not yielded their bodies to the gaol and prison of the said sheriff, or other officer, according to the effect of the same proclamation, that then every such person, that so shall make default, shall, for every such default, (a) forfeit to the queen’s highness, her heirs and successors, ten pounds, which shall likewise be estreated by the said justices into the said court of Exchequer, in such manner and form as fines and amercements there taxed and assessed are used to be.

nalty to enforce it; and therefore the writ doth not only issue upon excommunication in any other cases, but (as hath been often adjudged) though a *capias* with proclamations and penalties go forth in a matter not within this statute, and the person be thereupon imprisoned, and pray to be discharged, because the matter for which he was excommunicated (though of a spiritual nature) is not within this statute, yet nothing shall be discharged but the penalties, and (without any new writ obtained) the excommunication and imprisonment may remain as at common law, and not be discharged but by absolution in due form. *Gibf. Cod.* 1166. but for this *vide Cro. Car.* 197. 199. *Roll. Abr.* 175. *Jon.* 226. *Latch.* 174. 204. 2 *Jon.* 89. *Show.* 17. 3 *Mod.* 42-3. *Skin.* 167. pl. 6. *Vern.* 24. *Salk.* 294. pl. 4. 7 *Mod.* 56. 117.

“ 6. And thereupon the said justices of the King’s Bench shall also award forth one other writ of *capias* against the said person or persons that so shall be returned to have made default, with such like proclamation as was contained in the first *capias*, and a pain of 20 *l.* to be mentioned in the second writ and proclamation; and the sheriff or other officer, to whom the said second writ of *capias* shall be so directed, shall serve and execute the said writ in such like manner and form, as before is expressed, for the serving and executing of the said first writ of *capias*; and if the sheriff or other officer shall return upon the said second *capias*, that he hath made the proclamation according to the tenor and effect of the same writ, and that the party hath not yielded his body to prison, according to the tenor of the said proclamation, that then the said party, that so shall make default, shall, for such his contempt and default, forfeit to the queen’s highness, her heirs and successors, the sum of twenty pounds, which said sum of twenty pounds the said justices of the King’s Bench for the time being shall likewise cause to be estreated into the said court of Exchequer, in manner and form afore said.

“ 7. And then the said justices shall likewise award one other writ of *capias* against the said party, with such like proclamation and pain of forfeiture as was contained in the said second writ of

“ *capias*, and the sheriff or other officer, to whom the said third writ of *capias* shall be so directed, shall serve and execute the said third writ of *capias*, in such like manner and form as before in this act is expressed and declared, for the serving and executing of the said first and second writs of *capias*; and if the sheriff or other officer, to whom the execution of the said third writ shall appertain, do make return of the said third writ of *capias*, that the party upon such proclamation hath not yielded his body to prison, according to the tenor thereof, that then every such party, for every such contempt and default, shall likewise forfeit to the queen’s majesty, her heirs and successors, other 20 *l.* which sum of 20 *l.* shall likewise be estreated into the said court of Exchequer, in manner and form aforesaid; and thereupon the said justices of the King’s Bench shall likewise award forth one other writ of *capias* against the said party, with like proclamation and like pain of forfeiture of 20 *l.*, and that also the said justices shall have authority by this act infinitely to award such process, with such like proclamation and pain of forfeiture of 20 *l.* as is before limited against the said party that so shall make default in yielding his body to the prison of the sheriff, until such time as by the return of some of the said writs before the said justices it shall and may appear, that the said party hath yielded himself to the custody of the said sheriff or other officer, according to the tenor of the said proclamation, and that the party, upon every default and contempt by him made against the proclamation of any of the said writs so infinitely to be awarded against him, shall incur like pain and forfeiture of 20 *l.*, which shall likewise be estreated in manner and form aforesaid.

“ 8. And be it further enacted by the authority aforesaid, That when any person or persons shall yield his or their body or bodies to the hands of the sheriff or other officer, upon any of the said writs of *capias*, that then the same party or parties, that shall so yield themselves, shall remain in the prison and custody of the said sheriff or other officer, without (a) bail, baston, or mainprize, in such like manner and form, to all intents and purposes, as he or they should or ought to have done, if he or they had been apprehended and taken upon the said writ of *excommunicato capiendo*.

(a) By the 1 E. 3. c. 8. Persons excommunicate, taken at the request of the bishop, are expressly held to be irreplevisable; but it hath been held, that

the court of King’s Bench may, as well before as since this statute, bail a person taken upon *excommunicato capiendo*. Bullst. 122. — But where the court refused in such a case to bail the bishop of St. David’s, vide 7 Mod. 61. [It is a commitment in execution, and therefore it seems the court can have no power to bail. 1 Show. 16.]

“ 9. And that if any sheriff or other officer, by whom the said writ of *capias*, or any of them, shall be returned, as is aforesaid, do make an untrue return upon any of the said writs, that the party named in the said writ hath not yielded his body upon the said proclamations, or any of them, where indeed the party did yield himself, according to the effect of the same, and that then every such sheriff or other officer, for every such false and untrue return, shall forfeit to the party grieved and damnified

“ by such false return, the sum of 40 *l.*; for the which sum of
 “ 40 *l.* the said party grieved shall have his recovery and due re-
 “ medy by action of debt, bill, plaint, or information, in any of
 “ the queen’s courts of record; in which action, bill, plaint, or
 “ information, no essoin, protection, or wager of law, shall be
 “ admitted or allowed for the party defendant.

“ 10. Saving and reserving to all archbishops and bishops, and
 “ all others, having authority to certify any person excommuni-
 “ cated, and like authority to accept and receive the submission
 “ and satisfaction of the said person so excommunicated in man-
 “ ner and form heretofore used, and him to absolve and release,
 “ and the same to signify, as heretofore it hath been accustomed,
 “ to the queen’s majesty, her heirs and successors, into the high
 “ court of Chancery, and thereupon to have such writs for the
 “ deliverance of the said person so absolved and released from the
 “ sheriff’s custody or prison, as heretofore they or any of them
 “ had, or of right ought or might have had; any thing in this
 “ present statute specified or contained to the contrary hereof in
 “ anywise notwithstanding.

“ 11. Provided always, That in *Wales*, the counties palatine of
 “ *Lancaster*, *Chester*, *Durham*, and *Ely*, and in the *Cinque Ports*,
 “ being jurisdictions and places exempt, where the queen’s
 “ majesty’s writ doth not run, and process of *capias* from thence
 “ not returnable into the said court of the King’s Bench, after
 “ any *significavit*, being of record in the said court of Chancery,
 “ the tenor of such *significavit* by *mittimus* shall be sent to such of
 “ the said head officers of the said country of *Wales*, counties
 “ palatine and places exempt, within whose offices, charge, or
 “ jurisdiction, the offenders shall be resiant, that is to say, to the
 “ chancellor or chamberlain for the said counties palatine of *Lan-*
 “ *caster* and *Chester*, and for the *Cinque Ports* to the lord warden of
 “ the same, and for *Wales* and *Ely*, and the counties palatine of
 “ *Durham*, to the chief justice or justices there; and thereupon
 “ every of the said justices and officers, to whom such tenor of
 “ *significavit* with *mittimus* shall be directed and delivered, shall,
 “ by virtue of this estatute, have power and authority to make
 “ like process to the inferior officer and officers, to whom the ex-
 “ ecution of process there doth appertain, returnable before the
 “ justices there, at their next sessions or court, two months at
 “ least after the *teste* of every such process; so always as in every
 “ degree they shall proceed in their sessions and courts against
 “ the offenders, as the justices of the said court of King’s Bench
 “ are limited, by the tenor of this act, in term-times to do and
 “ execute.

“ 12. Provided also, and be it enacted, That any person, at the
 “ time of any process of *capias* aforementioned awarded, being in
 “ prison, or out of this realm, in the parts beyond the sea, or
 “ within age, or of *non sane memorie*, or woman covert, shall not
 “ incur any of the pains or forfeitures aforementioned, which
 “ shall grow by any return or default happening during such time
 “ of nonage, imprisonment, being beyond sea, or *non sane memorie*;
 “ and

“ and that by virtue of this statute, the party grieved may plead
 “ every such cause or matter in bar of and upon the distress or
 “ other process, that shall be made for levying of any of the said
 “ pains or forfeitures.

“ 13. And that if the offender, against whom such writ of *ex-*
communicato capiendo shall be awarded, shall not in the same writ
 “ of *excommunicato capiendo* have a sufficient and lawful (a) addi-
 “ tion, according to the form of the estatute of (b) *primo* of Henry
 “ the Fifth, in cases of certain suits, whereupon process of *exigent*
 “ are to be awarded, or if in the *significavit* (c) it be not contained,
 “ that the excommunication doth proceed upon some cause or
 “ contempt of some original matter of heresy, or refusing to
 “ have his child baptized, or to receive the holy communion,
 “ as it is now commonly used to be received in the church of
 “ *England*, or to come to divine service now commonly used in
 “ the said church of *England*, or errors in matters of religion, or
 “ doctrine now received and allowed in the said church of *Eng-*
 “ *land*, incontinency, usury, simony, perjury in the ecclesiastical
 “ court, or idolatry, that then all and every pains and forfeitures
 “ limited against such person excommunicate by this statute, by
 “ reason of such writ of *excommunicato capiendo*, wanting sufficient
 “ addition, or of such *significavit*, wanting all the causes afore-
 “ mentioned, shall be utterly void in law, and by way of plea to
 “ be allowed to the party grieved.

(a) That if the party excommunicated has no addition in the writ, he may be discharged on motion. Salk. 294. pl. 4. Show. Rep. 16. But where the parties were named *A. B. merchant, G. D. gent. E. F. yeoman de paroch. de D.* this was held well, though it was objected, that the addition of the parish

should refer to him only who was last mentioned. The King and Barnes, 3 Mod. 42, 43. Skin. 176. pl. 6. S. C. adjudged. (b) This statute (1 H. 5. c. 5.) enacts, That in every original writ of actions personal, appeals, and indictments in which the *exigent* shall be awarded in the names of the defendants in such original writs, appeals, and indictments, additions shall be made of their estate or degree or mystery, and the towns, hamlets, or places, and the counties where they were or be conversant, &c. [(c) Before this statute, it was not necessary to shew the cause in the writ, only in the bishop's certificate, but it was sufficient to say the party was excommunicated for manifest contumacy. Per Holt, C. J. 1 Ld. Raym. 619.]

“ 14. And if the addition shall be with a *nuper* of the place,
 “ then in every such case, at the awarding of the first *capias*
 “ with proclamation, according to the form mentioned, one writ of
 “ proclamation (without any pain expressed) shall be awarded into
 “ the county, where the offender shall be most commonly resiant
 “ at the time of the awarding the said first *capias*, with pain, in
 “ the same writ of proclamation, to be returnable the day of the
 “ return of the said first *capias*, with pain, and proclamation
 “ thereupon, at some one such time and court as is prescribed for
 “ the proclamation, upon the said first *capias*, with pain, and if
 “ such proclamation be not made in the county where the
 “ offender shall be most commonly resiant, in such cases of addi-
 “ tions of *nuper*, that then such offender shall sustain no pain or
 “ forfeiture by virtue of this statute, for not yielding his or her
 “ body according to the tenor aforementioned; any thing be-
 “ fore specified, and to the contrary hereof in anywise notwith-
 “ standing.”

(F) Of absolving and assoiling a Person excommunicate.

2 Inst. 623.
12 Co. 76.
& vide the
9 E. 2. c. 7.
(a) For this
vide F.N.B.
141.
Sid. 232.

IF a person be unjustly excommunicated, that is, if he be excommunicated for matter of which the spiritual court hath not cognisance, and he be taken on a writ of *excommunicato capiendo*, the party grieved shall have (a) a writ out of Chancery to the sheriff, to deliver him out of prison.

So, if the spiritual court proceed *inverso ordine*, as if they refuse a copy of the libel, &c., a prohibition shall go, with a clause to absolve and deliver the party injured.

2 Inst. 623.

Also, if a man be excommunicated, and offer to obey and perform the sentence, and the bishop refuse to accept and to assoil him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to assoil him, &c. and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate. And so the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical cognisance. Also, the bishop, in those cases, may be indicted at the suit of the King.

Gibb. Codex,
1110.
(b) This
method of
taking caution
was
once held
to be against
law; Bulst.
122. But
was afterwards
on
great debate
held to be

But if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law injoin him; which caution, in the civil law, is of three sorts. 1. (b) *Fidejussoria*, as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratitio* or *realis cautio*, as when a man engageth goods, or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing taketh a corporal oath to do it; which last is now the most frequent method.

good, and that the bishop having a discretionary power herein, it was as much in his option to take caution by obligation, as by either of the other two methods. 2 Lev. 36. Raym. 225.

But for this
vide Cro.
Car. 199.
Cro. Jac.

If, after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c., it seems that this offence is taken away without any formal absolution.

212. 8 Co. 68. Jon. 227. 2 Lev. 36.

Execution.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 H. 8. c. 6., &c. and of the Statute Merchant and Staple.

2. Of the several Processes on these Securities when forfeited, in order to a full execution: And therein,

1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c., and they from each other.*

2. *At what Time Execution may be granted on each of them.*

3. *Who shall have Execution on them, as the Person alters.*

4. *Against whom Execution may be granted.*

3. What Things are bound by them, and are liable to be extended for the Satisfaction of them.

4. What Provision the Law has made for Tenant by Statute Merchant, &c. in case of Eviction.

5. The several Ways of vacating and discharging those Statutes, and this, either before or after Execution.

(C) Of the several Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teste, and Return of such Writs.

2. Of the *Elegit*.

3. Of the *Capias ad Satisfaciendum*.

4. Of the *Fieri facias* and *Levari facias*.

5. Of the *Habere facias Seisinam* and *Possessionem*.

(D) Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he hath not received entire Satisfaction on his first Writ; and this, either against the Party or Sheriff.

- (E) Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.
- (F) Who are entitled unto, and may sue out Execution.
- (G) Of the Persons against whom Execution may be sued out: And herein,
1. Of suing Execution where there are several Parties concerned.
 2. Of suing out Execution against the Heir and Executor.
 3. Of suing out Execution against Infants.
 4. Of suing out Execution against a Feme Covert.
 5. Of suing out Execution against privileged Persons.
 6. Of suing out Execution against a Clerk in Holy Orders.
- (H) At what Time Execution may be sued out: And herein of the Necessity of a *Scire Facias*.
- (I) To what Time the Execution shall have Relation, so as to avoid any Alienation by the Party: And herein of the Statute of Frauds.
- (K) Of the King's Precedency in Executions.
- (L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.
- (M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.
- (N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.
- (O) Of the Offence of hindering or obstructing an Execution.
- (P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.
- (Q) To what he shall be restored when such erroneous Execution is set aside.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

EXecution is the obtaining actual possession of a thing recovered by judgment of law, and (a) is called the life of the law, and therefore in all cases to be favoured. Co. Lit. 154. a. Carter, 1942.
est fructus, finis, & effectus legis. Co. Lit. 289. 5 Co. 87.—It differs from an action which continues only till judgment is given, and therefore a release of all actions is regularly no bar of an execution. Co. Lit. 289. 2 Roll. Abr. 404.

And here it will be necessary to consider what things are liable to execution at common law in personal actions. These we find were only the annual profits of the land as they arose, and the goods and chattels of the debtor; for neither his body nor lands were affected by recognizances or judgment for debt or damages, except as hereinafter excepted. Hob. 60. 3 Co. 12. b. Sir William Herbert's case. Cro. Jac. 450. Plow. 440. 2 Inst. 19. 2 Roll. Abr. 472.

The reason why the common law subjected only the personal estate to the payment of debts, seems to be, for that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no further than they had visible chattels to answer the debt. The lands were not liable, because they were obliged to answer the duties to the feudal lord; and a new tenant could not be forced upon him without his consent in the alienation; and the person was not liable, because that was obliged by the tenure to serve the king in the wars, and at home the several lords, according to the distinct natures of their tenure. But though this law was well framed for a nation bred to wars, who were to extend their fame and power by arms, yet it was no ways calculated to the circumstances and constitution of a trading people, whose power and credit rise and fall in proportion to the increase or decay of trade; therefore, in such a nation, laws ought to be so contrived and framed, as to invite foreigners to trade with us, and bring their commodities to us; and the great encouragement to this will be to allow them all possible security in their contracts and dealings; and the way to that will be to subject all the effects of the debtor, whether in lands or chattels, and his person too, to satisfy the creditor; for otherwise it would be in the power of every bad man, by converting his chattels into land, to defraud his creditor, and against all reason and equity enjoy the profits of that land which he purchased with another's money. Accordingly we find, that towards the reign of *Ed. I.* when *magna charta* had given the tenants a power of alienation, without acquainting their lords, if they left enough to answer the duties of their tenure, they began to subject the land to answer the debts in trade; and as they grew more and more a trading people, it was thought reasonable that the person should be liable, that a close confinement might oblige him the sooner to satisfy his creditors, as also make

make him the more wary how he contracted debts, without the prospect of a competent fund or provision to discharge them.

Plow. 441.
3 Co. 11.

But even at common law we find, that the king, by his prerogative, might have execution of body, goods, and lands, but still under this restriction, that the land was not extendible while the chattels were sufficient and the debtor ready to answer the debt.

3 Co. 12. a.
Cro. Jac.
450.
Plow. 441.

Also, in case of a private person, the land was liable to execution, as in an action of debt against an heir upon an obligation made by his ancestor; if the plaintiff had judgment, the law dispensed with the former rules, rather than the creditor, who fairly made out his demands, should be without a remedy, and therefore gave the lands descended, in execution, to answer the debt; for since the common law allowed the action of debt against the heir, the creditor could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the heir.

Roll. Abr.
226.
Poph. 87.
Hob. 58.
Dyer, 344. b.
Co. Lit. 144.

So, if *A.* had granted for him and his heirs, to *B.* and his heirs, such a rent out of his lands, in this case, the heirs, being comprehended in the contract, are bound to make good the grant as far as they have assets by descent from the grantor: and this was allowed at common law, because the grantee of the rent had the land originally in view for his security; and by the grant itself, having it in his power to distrain the land for the rent, it was equal to the heir, whether the land was to answer the rent by distress, or by an execution upon a judgment in a writ of annuity.

Hob. 60.
2 Roll. Abr.
475.
*11 Ed. 1.

Thus stood the common law till the statute of *Acton Burnell**, and the 13 *Ed. 1. de mercatoribus*, which, as appears in the preamble, was for the security of merchants and encouragement of trade, and subjected not only the goods and persons, but the lands likewise of the debtor, into whose hands soever they came after the statute acknowledged.

(a) Viz. 13.
Ed. 1. c. 13.
commonly
called the
statute of
West. 2. vide
2 Inst. 394-5.

Also, in the same year and reign the *elegit* was given; and by this (a) statute, he who recovereth in debt or damages, may have either a *fieri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plough, and the one half of his land, until the debt be levied upon a reasonable price or extent.

Vide Dalt.
Sher. 144.

The 25 *Ed. 3. c. 17.* subjected the person of the debtor, and gave the *capias ad satisfaciend.* in debt, detinue, &c., in the case of a common person.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 H. 8. c. 6., &c. and of the Statute Merchant and Staple.

AN obligation by matter of record is a writing obligatory acknowledged before a judge, or other officer having authority for that purpose, and enrolled in a court of record; and of this there are two sorts, viz. recognizances or statutes.

The original of the acknowledgment of obligations in courts of record seems to be, that there might be no occasion to have the trouble and charge of the proving, which was formerly in the manner of contracting more expensive than at present; for formerly the persons under the *his testibus* were joined to the jury who tried the cause, and the creditor was obliged by process to bring them in to join them to the jury, which form, as my Lord Coke has observed, made great delay in the proceedings. To save this expence, the acknowledgment was made in courts of justice, and then the court attesting the deed, there needed no proceeding or trial to make it evident. Co. Lit. 6.

The first of these securities is the recognizance at common law, which is no more than an obligation on record, and may be acknowledged before the several judges out of term, and in any part of England, and may be entered on record, as well out, as in term: so, the (a) chancellor or keeper may take recognizances and award execution, or hold plea of *scire facias* and *audita querela* in the Chancery, to avoid execution, &c. as the case requires, on all recognizances taken in that court. Bro. Recognizance, 20. Vaugh. 102. Hob. 195. 4 Inst. 79. (a) But if a person enters into a recognizance to the chancellor for a debt

due to himself, it is a void recognizance; for the law will not trust him with the exercise of his power in his own case: but if one enters into a recognizance to the chancellor and a stranger, it is a good recognizance as to the stranger; for, so far as his interest is concerned, the chancellor is a proper person to take it, and cannot be said to be a judge in his own cause. Dyer, 220. 8 Co. 118. a. Co. Lit. 141. a.

By the custom of the city of London, the mayor, aldermen, or the mayor singly, may take recognizances; for the custom is not only reasonable in itself, but, as all other customs of the city, has been confirmed by act of parliament. 4 Co. 64. b. 2 Inst. 395. Cro. Eliz. 187. Roll. Abr. 557.

The king, by special commission, may appoint any person to take recognizances from one man to another, and such a recognizance duly certified with the commission into Chancery is of equal force with the former; and though the commission be so particular, that it only mentions a recognizance to be taken from A. to B., yet says *Fitzherbert*, the commissioners have a general power to take a recognizance from any other person. Fitz. N. B. 267. A. Register, 149.

But those recognizances at common law are no perfect record, till they are enrolled in some court of record; yet if they be taken on

on one, and enrolled on another day, they find as reasonable provision in the law; for since it allows any one judge out of court, and in any part of the kingdom, to take these recognizances which are the highest security of the common law, it was very necessary they should be enrolled to perpetuate the contract, and by that means secure the creditor his just debt, which must have been very precarious and uncertain, while the security lay in a private hand, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it.

23 Ed. 1.

2. 3.

2 Roll. Abr.

466.

A statute merchant is a bond of record, acknowledged before one of the clerks of the statute merchant, and mayor of the city of London, or two merchants of the said city, for that purpose assigned, or before the mayor or warden of the towns, or other discreet men for that purpose assigned. This recognizance is to be entered on a roll, which must be double, one part to remain with the mayor, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the king, for that purpose appointed, shall be affixed, together with the seal of the debtor.

The design of this security was to promote and encourage trade, by providing a sure and speedy remedy for merchant-strangers as well as natives, to recover their debts at the day assigned for payment, the want of which, says the statute of (a) *Aston Burnell* (which first created the statute merchant), in a great measure prevented the importation of foreign commodities, and discouraged strangers from trading with us, to the detriment not only of our own merchants, and other subjects, but of the prince himself, whose customs rise and fall in proportion to the increase and decay of trade.

(a) 11 Ed. 1.

Winch. 33.

But though the statute merchant seems first to have been introduced, and was wholly calculated for the ease and benefit of merchants, as the name itself imports; yet it was not long ingrossed by them; for other men finding from their own observation, that it was much of the same nature with judgments given in *Westminster-Hall*, but obtained with infinite less trouble and expence, out of regard to their own interest and quiet, easily fell into this way of contracting, and by degrees it came to be proved into a common assurance, as we find it at this day.

The addition of the king's seal, which was never required to any contract at common law, was to authenticate and make the security of a higher nature than any other then known; for by this the king, in the person of the mayor, &c. attests the contract, and takes consufance of the debt, and, consequently, execution is to be awarded upon failure of payment at the day assigned, without any mesne process to summon the debtor, or the trouble or charge of bringing in proofs to convict him: for the judges, who are the king's representatives, for the more speedy administration of justice, require these on common contracts and specialties, to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant; but to this contract the king himself, by the mayor, warden, &c. is a witness,

witness, and has the frank acknowledgment and confession of the debtor, that he really owes so much, which is the best and surest proof the law requires; therefore the legislators of that time, out of a just regard to the prerogative and justice of the king, on these contracts, as on judgments, allowed of an immediate execution; these being the surest means of conviction, viz. the confession of the consumer on record, which the judges at *Westminster* seldom have to frame their judgments on; and thus it must be presumed from the force of them, which is equal to judgments of the superior courts, they obtained the name of pocket judgments.

3 Sheph.
Abr. 318.

The seal of the king consists of two pieces, one to lie in the custody of the mayor, and the other of the clerk that enrolls the recognizance, the better to prevent any fraud or corruption this security might be liable to, if the seal lay in one hand.

Cro. Eliz.
233. 319.

The statute staple is a bond of record, acknowledged before the mayor of the staple, in the presence of all or one of the constables. To this end, says the (a) statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple. This seal of the staple is the only seal the statute requires to attest this contract; but it is no more under the power or disposal of the mayor, than that appointed by the statute merchant; for though the statute appoints him the custody of it, yet it is in such a manner, that he cannot affix it to any obligation without their consent, it being to remain in the mayor's hands, under the security of their own seals.

2 Roll.
Abr. 466.
(a) 27 Ed. 3.
ft. 2. c. 9.*
* Also vide
c. 8. of the
same statute;
and 36 E. 3.
c. 7.

To understand a little of the original and constitution of the staple, and the advantage the nation had by this establishment, we must observe, that the place of residence, whither the merchants resorted with their staple commodities, was anciently called *estapel*, which signifies no more than *mart* or *market*; and this was formerly appointed out of the *realm*, as at *Calais*, *Antwerp*, &c. and other ports on the continent which were nearest to us, and whither the merchants might with safety coast it.

4 Inst. 238.

But besides these staple ports appointed abroad, there were others appointed at home, whither all the staple commodities were carried in order to their exportation, such as *London*, *Westminster*, *Hull*, &c. this was found to be of great use and consequence to the prince in particular, and to the interest and credit of the nation in general; for at these staple ports were the king's customs easily collected, and were by the officers of the staple, at two several payments, returned into the exchequer. Besides, at these staples, all merchants goods were carefully viewed and marked by the proper officer of the staple; and this necessarily avoided the exportation of decayed goods, or ill-wrought manufactures, and, consequently, fixed a stamp of credit on the merchandizes exported, which, upon the view, always answered the expectation of the buyer.

Maline's
Lex. Merc.
337-8.
Vide the
27 E. 3.
c. 1.

The staple merchandizes, according to Lord (b) *Coke*, are only wool, woollfells, leather, lead, and tin; (c) others add butter, cheese,

(b) 4 Inst.
238.
(c) Maline's

Lex. Merc. 237.
27 E. 3. c. 8. cheefe, and clothes; but whatever they were, the mayor and constables had not only conuafance of all contracts and debts relating to them, but they had likewise jurisdiction over the people and all manner of things touching the staple. This power was given them, lest the merchants should be diverted and drawn from their business and trade, by applying to the common law, and running through the tedious forms of it, for a determination of their differences, and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the staple.

Co. Lit. 290. By this it appears, that this security was only designed for the merchants of the staple, and for debts only on the sale of merchandizes brought thither; yet in time others began to apply it to their own ends, and the mayor and constable would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple. To prevent this mischief, the parliament in 23 H. 8. c. 6. § 11. reduced the statute staple to its former channel, and laid a penalty of 40 l. on the mayor and constables, who should extend the benefit of the statute to any but those of the staple. But though the statute of 23 H. 8. c. 6. deprived them of this benefit; yet it framed a new sort of security, to be used *ad libitum* by all men, known by the name of a Recognizance on 23 H. 8. c. 6. or a recognizance in the nature of a statute staple, so called, because this act limits and appoints the same process, execution, and advantage in every particular, as is set down in the statute staple.

Co. Lit. 290. a.
4 Inst. 238.
2 Roll.
Abr. 466.
Co. Ent. 12. A recognizance therefore in nature of a statute staple, as the words of the act declare, is the same with the former, only acknowledged under other persons; for as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence, out of term, the mayor of the staple at *Westminster*, and the recorder of *London*, jointly together, shall have power to take recognizances for payment of debt in the form set down in the statute. In this, as in the former cases, the king appoints a seal to attest the contract, which such of the said justices shall have the keeping of, and the said mayor and recorder another of the same print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor or recorder, must be sealed with the seal of the conusor, with the king's seal, and with the seal of the chief justice, or the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names: besides this, the clerk of the recognizance (who is to be appointed for this purpose by the king) or his deputy, shall make and write all obligations thus acknowledged, and enrol them in two several rolls indented, one whereof shall remain with such of the said justices, or with the mayor and recorder that take the recognizance, and the other with the clerk, who is farther obliged, at the request of the conusee, his executors, or administrators, to certify such obligations into Chancery under his seal.

But

But now by stat. 8 Geo. 1. c. 25. § 1. the clerk of the recognizances, or his deputy, shall prepare three parchment rolls, and shall, at the times of acknowledging every such recognizance, fairly write or engross, instead of the heads or contents thereof, on the said rolls, the full tenor, *in hæc verba*, of every such recognizance; and one of the rolls shall contain all the recognizances taken before the chief justice of the King's Bench; another the recognizances taken before the chief justice of the Common Pleas; and the other the recognizances before the mayor of the staple at *Westminster*, and recorder of *London*; and the persons before whom such recognizances shall be taken, as well as the parties acknowledging the same, are to sign their names to the roll of every recognizance, under the enrolment thereof, as well as sign and seal the recognizance; and all rolls so signed shall at the end of every year be fixed together, and made one roll of, and are to remain in the custody of the clerk, who is to keep a docket for searches.

2. Of the several Processes on these Securities when forfeited, in order to a full Execution.

But before we enter into a particular inquiry concerning these processes, it is proper to take notice, that the interest gained upon an execution of a statute or recognizance is to be followed by an actual entry of the conussee to perfect his security, and till such entry the conussee hath only a possession in law, which he cannot assign or transfer over to any other person; therefore where the administrator of a conussee in a statute after his death sued forth an extent, and upon that a *liberate*, which was returned, and before any actual entry or recovery of the possession in ejectment, or without executing the deed upon the land, did by indenture assign over all his interest to the lessor of the plaintiff, who thereupon brought his ejectment; it was adjudged, that the assignment was void; for by the return of the *liberate* he had accepted the possession, and was estopped to say the contrary; then when the owner still continues in possession, this turns the possession which the administrator had accepted by the *liberate* to a right, and such right is by no means assignable; nor is this like an *interesse termini*, which, it is true, the lessee may assign over before actual entry, because in that case the lessor is the principal agent, and hath done all on his part to transfer over an interest to the lessee, which he may execute at pleasure; and as the person who sues the *liberate* in this case is estopped to say, that he hath not the possession; so is the lessor in the other case estopped to say, that he hath the possession, against his own lease.

3 Lev. 312.
Stephens and
Hanham.
Saik. 563.
pl. 1. S. C.
4 Mod. 48.
S. C.
1 Show. 290.
S. C. Skin.
300. S. C.

See *post*, D.

1. Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c. and they from each other.

If the conusor be within the jurisdiction of the mayor, or other officer, before whom the statute merchant was acknowledged, and

13 Ed. 1.
stat. 3:

be found there, then upon the conusee's bringing the statute, &c. to the mayor, &c. and clerk, and their finding the record of it, and the day of payment lapsed, the mayor may apprehend and imprison the conusor (if he be lay), there to remain till he satisfies his creditor.

Winch. 82.
Jon. 52. And although there be no day of judgment expressed in the statute, yet this omission of the clerk does not vitiate the statute; for in this, as in obligations, where no actual day is appointed for payment, the legal day is presently, or when the conusee pleases to demand it.

Winch. 83.
85. But there may be a day of payment fixed in the statute, and yet the statute void; as if it be payable at *Michaelmas* after *J. S.* goes to *Paul's*, or returns from *Rome*; these are void statutes, because it does not appear judicially to the mayor, when to award execution; but if the statute be payable the first return of *Michaelmas* term, or before *Michaelmas*, there is sufficient certainty in these, and the mayor ought to take notice of them.

2 Roll.
Abr. 473. But if the conusor be out of the jurisdiction of the mayor, then shall he send the recognizance under the king's seal into Chancery, after which certificate the first process is a *capias* to take his body only; and if upon this the sheriff returns a *cepi corpus*, the debtor shall remain in prison a quarter of a year, in which time he may dispose of his goods and lands to the best advantage to pay his debts; but if the conusor either omits to satisfy his creditor in that time, or if the sheriff had returned on the *capias non est inventus*, or the conusor dead, then shall the execution be granted against lands, goods, and chattels, and they be delivered to the conusee by a reasonable extent till the debt be levied; this writ of execution the sheriff is to return into one of the benches, and how he hath performed the service.

And here we must take notice, that the process on a statute merchant differs from that on the statute staple, and the recognizance in nature of a statute staple, in four particulars:

Pro. Statute Merchant, 16. 1. If the conusor cannot be found within the staple, nor his goods, to the value of the debt; the first process, after the certificate under the seal in Chancery, is to take body, lands, and goods, all in one writ, in which respect it is preferable to the statute merchant, as being a much speedier remedy.

4 Inst. 79.
Co. Lit. 290. 2. They differ in respect of the place of the return; for, as is before observed, the writ of execution on the statute merchant is returnable in either bench; but upon the statute staple the writ is returnable into Chancery; and 23 H. 8. c. 6. which first brought in the recognizance in nature of a statute staple, referring in this to the same process and execution established by 27 E. 3. §. 2. c. 9. on the staple, the law must be the same in both cases.

2 Roll.
Abr. 475. 3. They differ in the substance of the writ of execution, for upon the statute merchant the sheriff may deliver the lands, &c. to the conusee, upon a reasonable extent, without the delay or charge of a *liberate*; but upon the statute staple, or recognizance in nature of it, the sheriff, after the extent, cannot deliver the lands, &c. to the conusee, but must seize into the king's hands,

and the conusee must have a *liberate* to get the lands, &c. into his hands; and in this respect the statute merchant is preferable to the statute staple, or recognizance in nature of it.

4. A fourth difference is, that the statute merchant having the seal of the conusor besides the king's seal, the conusee may waive the execution given by the statute, and use it as an obligation, and bring an action of debt on it: so, for the same reason may the conusee, on the 23 H. 8. c. 6. the recognizance having the seal of the conusor to it: *scilicet* of a statute staple, because the king's seal only, without that of the party, is affixed to it, which is absolutely necessary in all obligations at common law.

Bro. Statute Merchant, 16. Moor, pl. 1097. Cro. Eliz. 494.

2. At what Time Execution may be granted on each of them.

For the time of execution we must distinguish between recognizances at common law and statutes merchant, &c. for upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue execution within the year after the money became payable. But this law was (a) altered in Edward the First's time, and the conusee had a *scire facias* given him to revive the judgment, and put it in execution if the conusor cannot stop it by pleading such matters as the law judges sufficient for that end, such as a release, &c. but the conusee of a statute merchant, &c. may at any time sue execution on them without the delay or charge of a *scire facias*.

Co. Lit. 291. 2 Inst. 469. F. N. B. 296. Bro. Recog. 17.

(a) By Westm. 2. 13 E. 1. it. 1. c. 45. Which *vide* p. 8.

If A. enters into a recognizance or statute, &c. to B. and but one day of payment is appointed for the whole debt, B. may have execution upon failure of payment in the method before set down; but if the sum be payable at three several days, as 20 l. at each day, the whole debt being 60 l. when the first day of payment is lapsed, the conusee may have execution for 20 l. immediately, and so for the rest as it becomes due, without waiting for the last day of payment, as he must have done if the debt had been due by bond. And this holds as well on recognizances at common law as upon statutes; and the reason is, because these are in nature of three several judgments.

2 Roll. Abr. 468. Bro. Execut. 142. Co. Lit. 292. 2 Inst. 395. 471. Reg. 147. 5 Co. 81.

3. Who shall have Execution on them, as the Person alters.

Here we must again distinguish between recognizances at common law, and statutes and recognizances introduced by statute law: for, in the first case, if the conusee dies before execution sued, his executor shall not sue it even within the year, without bringing a *scire facias* against the conusor: the reason is, because the law presumes the debt might have been paid to the testator, and therefore would not suffer the debtor to be molested, unless it appeared he had omitted to perform the judgment; and this was to be done by *scire facias* brought by the executor, for the alteration of the person altered the process at common law. But the

2 Inst. 395. 471. Bro. Stat. Merch. 16. 43. 50.

statute merchant, &c. being designed to encourage strangers to trade with us, in this, as in many other instances, they have the advantage of any security known in the common law; and this dilatory process is taken away in these cases by the several acts of parliament that first introduced them; and therefore upon the death of the conusee of a statute merchant, &c. his executors may come into Chancery, and, upon their producing the testament and the statute, shall have execution without *scire facias*, as the testator himself might.

But the difficulty in settling this point will be, either when there are two conusees, and one of them dies after process of execution is begun; or where there is but one conusee, and he dies after process begun. In order to clear these points, it is to be observed, that that which is certified into Chancery is a transcript of the record lodged with the mayor and clerk, and upon such certificate the Chancery views the pocket security, and then proceeds to issue the process according to the statute 13 Ed. 1. st. 3. *de mercator*; and if there be any disagreement between the pocket judgments and the certificate, there is a new *certiorari* awarded to the mayor to inspect the rolls, and make a re-certificate, as appears in the

(a) Reg.
148. b.

Dyer, 180.

(a) *registrar*. When the Chancery hath issued process in either bench, if the death of the conusor, or *non est inventus* is returned, so that it appears, that the person is not to be found to give satisfaction, the benches direct all other process, in order to give the party satisfaction. And the reason of this is, from the direction of the statute to return the process into these courts, which was upon this original policy, that all parties in interest might come in and have an opportunity to litigate where every man's property is determined.

But if the conusee dies after process returned into C. B. his executors cannot carry on the process there, because the statute directs a certificate of such sort of recognizance into the Chancery, and the benches have no power to proceed, but according to the authority derived from that court; and whenever that authority ceases, as by the death of the party, the process is at an end; and therefore the court of Common Pleas cannot carry it into execution, as they could on a judgment obtained in their own court; but the suitor must go back into Chancery, as in all cases where process thence issuing is determined by the death of any of the parties. When the executor comes back into Chancery, there is a new *certiorari* awarded to the mayor to certify the record, both because the statute directs, that the Chancery shall issue process upon the recognizance returned, as also that it may appear to the court, that the security is still in being upon which the process is directed.

Roll. Abr.
467.

If the conusee of a statute merchant sues a *capias* returnable in B., and upon a *non est inventus*, an *extendi facias* is awarded by the court, and before execution executed the conusee dies, his executors cannot carry on the execution *in banco*, because that process out of Chancery which gave the court an authority to proceed, being

being in the testator's name, is now determined. But when the executor comes back into Chancery, he is not put to a new *capias*, but may have a special writ upon his case, to continue the process where it determined, because the *capias* would be nugatory and contrary to the record *in banco*, by which it appears, that the personal satisfaction failed, and the execution was awarded on his effects. But if the consuee of a statute merchant sues a *capias*, and upon a *non est inventus an alias* is awarded, before the return of which he dies, his executor, when he comes back into Chancery, must be put to a new *capias*, because the testator died in pursuit of the personal satisfaction, and there is no record in this case, whereby it appears deficient; and therefore the executor is put to a new *capias*, that the deficiency of the personal satisfaction may appear on the return of it, according to the direction of the statute. But it seems in both cases, by *Dyer* and the *register*, that there ought to be a new *certiorari* and re-certificate thereon, that the existence of the security may appear at the time when the process issues.

Dyer, 180. b.
Reg. 148.

If two consuees of a statute merchant sue execution, and the sheriff returns the consuee dead, upon which an *extendi* is awarded, and one of the consuees declares in court, that the other died since the suit commenced, and therefore prays execution for himself; in this case he must have a re-certificate of the record from the mayor, and then a writ upon his case directed to the bank to continue the process where it ended at the death of the other consuee; for it would be nugatory to put him to his *capias* again, since it appeared by the return of the sheriff, that the consuee was dead.

2 Roll.
467.
25 E. 3. 38.

If consuee of a statute staple dies, and *B.* his executor sues an extent in Chancery, but before execution executed *B.* dies, and administration *de bonis non* is granted to *C.* who continues the process, and after the extent returned sues out a *liberate* of the consuee's lands, which were taken in execution upon the *extendi* brought by *B.* and has them delivered to him; this is a void extent, and the consuee may recover his land in ejectment; for the *extendi* being sued in *B.*'s name, must by his death abate, and consequently, all the proceedings continued after by *C.* must fall, having no foundation to subsist on. Besides, *C.* comes in paramount the writ of *B.* not as privy to himself, but as the immediate representative of *A.* So, if in this case *B.* had sued an extent, and after execution, and a seizure into the king's hands, *B.* died, *C.* shall have no *liberate*, because he, coming in paramount the extent, cannot continue the process, which abated by the death of *B.*

2 Roll.
Abr. 467.
Cro. Car.
450. 457.
Jones, 385.

If a consuee of a recognizance in nature of a statute staple sue execution, and after the extent and seizure into the king's hands die, his executor shall have no *liberate*, for that were to continue the process which the testator begun, and abated by his death.

2 Roll.
Abr. 467.

4. *Against whom Execution may be granted.*

Bro. Stat.
 Merch. 33.
 Co. Lit. 290.
 Moor, pl.
 321. 203.
 Dyer, 239.
 Co. Ent. 12.
 * Where
 execution
 shall go
 against the
 heir after an
 alienation of
 lands de-
 scended, *vide*
 3 W. & M.
 c. 14. § 5.
 6. *infra*,
 vol. 3.
 p. 460.

If the conusor of a statute dies, the body of the heir * is protected by the statute from execution, but the lands and goods of the conusor are extendible in his hands; for it would be most unreasonable to subject the heir to payment of his father's debts, any farther than to the value of the assets descended; nor are these extendible in his hands, if he be an infant at the death of the conusor, till he comes of age. The statute in this particular is founded on the reason, and follows the course of the common law, by which, if judgment had been given against a man for debt or damages, and the defendant died before execution sued, his heir within age was not liable to execution during his minority; but the parol demurred till he came of age. And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Co. Lit. 290.
 Bro. Stat.
 Merch. 33.

So, if the conusor of a statute merchant dies, and his heir within age endows his mother, the land in dower shall not be extended during the minority of the heir.

3 Co. 14.

In the next place, let us see how the law directs the execution, where the conusor conveys the land to several persons after the statute acknowledged. It would be very unreasonable to load one feoffee with the whole debt, when the burden ought to be on the whole land, into whose hands soever it comes after the recognition acknowledged; and therefore the law allows of contribution against the other purchasers, by which we must not understand, that they are to allow the purchaser, whose land is extended, any thing by way of contribution to the extraordinary charge, which he ought not to bear alone; but the person grieved must relieve himself by *audita querela*, which sets aside the execution, and restores him to the mesne profits, and obliges the conusor to sue execution of all the lands.

Plow. 72.
 Pope and
 Rois.
 3 Co. 12.

And here we must consider by what rules the law has governed itself in such executions. By the words of the statute *de mercatoribus*, all the lands of the conusor are liable, and therefore the conusor may extend the execution to them all; but if while they continue in the hands of the conusor, he takes but part, it is a merciful execution to the conusor, because it leaves him the rest of the land for his subsistence in the mean time, and therefore he cannot set aside the execution as for partiality, since it is plainly made for his advantage. But if the conusor aliens part of his land, then the case is very much altered; for if the conusor sues execution of the land of the alienee, that were apparent partiality against him, and contrary to the intent of the conusor, which was to have all the land equally liable; and therefore such execution may

may be set aside by *audita querela*, for the apparent partiality and injustice of it. And it is the same law where there are several feoffees, and execution is sued against one of them only, and this for the same reason. But if the lands of the conusor only, after such alienation, had been taken in execution by the conusee, this execution had been good; for such conusor could not charge him with any partiality since the debt was his own, and his person and effects still liable after such alienation, and he is supposed to receive the purchase-money from the alienee; and therefore there is no reason to bring him into the payment of the debts which such conusor had previously contracted.

If *A.* seised of three acres in fee, acknowledges a statute to *J. S.* and enfeoffs *B.* of one acre, and *C.* of another, if *J. S.* sues out execution against *B.* he may have an *audita querela* to oblige the conusee to charge the lands of *A.* and *C.* equally, for 13 *Ed. 1.* says, that all the lands of the conusor shall be extended into whose-soever hands they come; and therefore the acre of *B.* shall not be liable to the whole debt, when the statute in this case subjects the other two: but if *J. S.* had sued execution against *A.* the conusor only, he shall have no *audita querela* to avoid it: so, if in this case the conusor had died, and execution had been sued against the heir, he shall have no contribution against *B.* and *C.* because the heir comes to the land without any consideration, and the conusor might bind his heir, as far as the land descended would answer his debts. And yet in some cases the heir shall have contribution; as if the ancestor acknowledge a statute, and die, leaving issue two daughters; or if the land which descends be of the nature of borough-english or gavelkind, the heir at law shall make the special heirs contribute, because all of them come in as heirs to the land descended, and are equally charged with his debts.

But if *A.* in the principal case had conveyed his three acres to *B.*, *C.*, and *D.*, and the conusee extended the acre of *B.* who after the extent conveys by fine his acre to *J. N.*, in this case *J. N.* cannot avoid the extent by *audita querela*, and have contribution against *C.* and *D.*, for though the feoffee of a feoffee may have contribution where the conveyance is before the extent; yet in this case *J. N.* claiming under a fine levied after the land was actually extended, must hold it under the incumbrance, for *transit terra cum onere*; and it is no way unreasonable that he should hold it as he purchased, since he is supposed to pay a consideration accordingly: besides, the judgment in the *audita querela* is, that the plaintiff shall be restored to all the mesne profits, which *J. N.* cannot have in this case, because the extent was sued before he purchased, and he can have no title to them but from the fine levied.

If *A.* binds himself in a recognizance or statute, and after his death some of his lands descend to the heir of the part of the father, and some to the heir of the part of the mother, both heirs shall be equally charged; and if the conusee loads one only, he shall have contribution.

Bro. Stat.
Merch. 49.
2 Inst. 396.
3 Co. 13. 2.
7 Co. 39. a.
Roll. Abr.
31 1. 2 Roll.
Abr. 472.
Plow. 72.

Hob. 25.
Co. Lit. 376.

2 Bull. 14,
15.

3 Co. 13. 2.
2 Co. 25. b.

2 Roll.
Abr. 468.

If *A.*, *B.*, and *C.* bind themselves jointly and severally in a statute, the conusee may have execution against one of them alone, or against all together; but he cannot have execution against two only; for the execution must pursue the statute, which is joint or several; but execution against two is neither one nor the other.

3. What Things are bound by them, and are liable to be extended for the Satisfaction of them.

Hob. 60.
2 Roll.
Abr. 475.

The statute of 13 *Ed. 1. de mercatoribus*, which, as appears in the preamble, was for the security of merchants and encouragement of trade, subjected not only the goods and person, but the lands likewise of the debtor into whose hands soever they came, after the statute acknowledged: therefore, if the person of the conusor only be taken in execution on a statute, and die, his goods and lands are still liable to the extent, because being all due at first to satisfy the conusee, he may, at discretion, take them all at one time, or at several.

3 Co. 12.
2 Roll.
Abr. 472.
Winch. 84.

So, if a conusor sell all or part of his lands, after he has bound himself, the conusee may still extend it by the words of the statute; otherwise it would be in the power of the conusor to frustrate the security intended by the law: so, if the conusor purchase after he has bound himself, such lands are subject to execution; for the statute says, "All his lands shall be extended," which still must be understood of those only which he has a power over, and may charge; and consequently, those which he disposed of for valuable consideration before his entering into the statute are not liable in the hands of the purchaser, for they really in no sense can be called his lands.

2 Roll.
Abr. 472.

If the conusor has two manors, the conusee may sue execution in which of the manors he pleases, for he may dispense with any part of the provision the statute has made for him.

Bro. Execut.
tion, 85.
Cro. Jac. 85.

If tenant in tail acknowledge a statute and die, and the conusor sue execution against the issue, the issue may avoid it, either by assise or *audita querela*; for no charge of the conusor's can affect the land in tail longer than his own life, by virtue of the statute *de donis*, which as to such lands repeals the other.

2 Roll.
Abr. 473.

If in this case, tenant in tail, after he had bound himself, had enfeoffed *J. S.*, and for his further assurance had levied a fine to him, the conusee may extend the land in the hands of *J. S.*, and neither he nor the issue in tail can avoid the execution, for the issue is totally barred by the fine, and *J. S.* purchased the land under the charge, and consequently, must hold it so.

Bro. Execut.
76. 2^d. * As
this does not
seem to be
law, nor consistent with the case next but one. *Supra.* *

But if tenant in tail bind himself in such recognizance or statute, and die, and his issue enfeoff *J. S.*, it seems, the conusee may extend the lands in the possession of *J. S.*

2 Roll.
Abr. 472.

If a reversioner upon a lease for years acknowledge a statute, both the reversion and rent are extendible, and the conusee may have

have an action of debt for the rent. So, a rent upon an estate for life may be extended for satisfaction of a statute: but the conusee in this case can have no action of debt for the rent, any more than the reversioner himself could have; because, during the continuance of the freehold, no action of debt lies for the rent.

Vide head of Rent.

If a reversioner in fee upon an estate for life acknowledge a statute, and after grant the reversion upon the death of tenant for life, the conusee may extend the land, for the reversion being a tenement is bound by the statute.

Moor, pl. 118. 2 Roll. Abr. 473.

So, if *A.* seised of a rent-charge bind himself in a statute merchant, this rent is extendible, for the word *land*, which the statute subjects to the execution, includes all hereditaments extendible, and the conusee in this case may distrain and avow for the rent, though the tenant never attorned; for the law creating his estate gives him all means necessary for the enjoyment of it.

Moor, pl. 104. Co. Lit. 135. By stat. 27 E. 3. st. 2. c. 9. the conusee hath an

estate of freehold. *Vide post.*

If the grantee of a rent-charge, after the acknowledgment of the statute, release to the tenant, by which the rent is extinguished, yet upon failure of payment the conusee may extend it; for to this purpose it has still a continuance, the statute *de mercatoribus* binding all the land (which includes all hereditaments extendible) the conusor had at the time of entering into the statute; consequently, this must be liable into whose hands soever it comes.

7 Co. 39. Lillingston's case.

If the conusor has lands in ancient demesne, they shall be extended on forfeiture of the statute; for though disputed titles to these lands are not determinable in courts of common law (and therefore ejectment does not lie of them) lest the tenants should be brought from the service of the plough; yet they are extendible in this case, for the extent is performed by the sheriff *in pais*, and the title of the land is not directly put in plea or dispute in the king's courts, by which the tenant might be brought from his business.

5 Co. 105. Moor, pl. 351. 2 Inst. 397. 2 Roll. Abr. 472. Hob. 47. but Dyer, 372. *cont.*

If a feoffment be made to *A.* upon condition to re-infeoff the feoffor, and *A.* binds himself in a statute; if *A.* continue seised of the land, or re-infeoff the feoffor, the land in either case may be extended by the conusee: for whoever comes to the land under the feoffment of *A.*, takes it chargeable with the statute, and consequently, is liable to the execution. But if the feoffor had entered, as he well might, because the feoffee had disabled himself to perform the condition, inasmuch as he cannot return it in the same plight it was given him, then he should not be charged; for this being a lawful entry, like an eviction in a court of record, sets aside all incumbrances. But if in this case *A.* had been disseised, and then bound himself in a statute, this had not charged the land during the disseisin, and consequently, there is no disability to perform the condition; for a disseisee can no more charge his right, as such, than he can transfer it; nor is the land extendible in the hands of the disseisor; because, though his entry is tortious, yet he held it free during the disseisin, as the disseisee enjoyed it: but if

Co. Lit. 222. 2 Co. 59. Julius Winton's case.

the

the disseisee enters or recovers by action, then the land becomes chargeable with the statute.

Co. Lit. 184. b.
2 Roll. Abr. 88.
6 Co. 79.
Lord Aber-
gavenny's
case.
Co. Lit. 185. a.
6 Co. 78,
79.
If *A.* and *B.* be jointenants in fee, and *A.* enter into a statute, and die before execution sued, the land is not extendible in the hands of *B.* because he claims the land as survivor from the first feoffment which conveyed it to him free from any charge. But if the conusee had sued execution before the death of *A.*, the survivor *B.* should hold it charged; for execution is equivalent to a sale, and, like a lease for years, shall bind the survivor. So, if *A.* in this case had, after the acknowledgment of the statute, released to *B.*, then the land would be chargeable with the statute, though *A.* should die before execution, because the acceptance of the release prevents him from claiming by survivorship; for by the release *B.* had the land before his companion died.

Co. Lit. 185. a.
2 Roll. Abr. 472.
But the law is otherwise in the case of parceners; for if one of them charged the land, the other shall hold it under the incumbrance of the statute, for he comes in as heir by descent under the charge; whereas the jointenant surviving claims from the first feoffment, which is prior to the charge.

2 Roll. Abr. 472.
If a conusor, at the time of acknowledging a statute, has goods and chattels to a great value, they are all liable to satisfy the conusee, if they be found in his hands when execution is sued: but if the conusor disposes of them, they shall not be extended in the hands of a purchaser, as lands may be; for since there is no solemnity established or required, it is impossible to find in whose possession they lie, in order to extend them: besides, it must necessarily put a stop to trade and commerce, if execution was to pursue the goods wherever they were found.

Roll. Abr. 346. 444.
Co. Lit. 46.
Vide tit. Baron and Feme.
If a husband, *possessed* of a *term* in right of his wife, acknowledge a statute, and die, the lease shall not be extended in the hands of the wife; for though the law gives him an absolute power over the term, so as to dispose of it, yet if he does not make use of that power during the coverture, the wife shall enjoy it free as she brought it to him. But if the execution be sued in his life, and the term extended, this will bind the wife; for the extent is a disposition in law to answer the conusee's debt, and therefore, shall affect the wife as much as if he had sold the term, or granted it for years.

Bro. Stat. Merch. 18.
Co. Lit. 32. a.
If the husband be *seised* of lands of *inheritance* in the right of his wife, and acknowledge a statute, upon which execution is sued, the heir upon the death of the feme, may enter and avoid the extent: but this must be understood of lands of which he cannot be tenant by the curtesy; for such he may as well charge as convey during his life, to bind the heir.

2 Roll. Abr. 475.
2 Inst. 305.
Hob. 60.
By what has been said, it appears what things are extendible and liable to execution for the satisfaction of statutes merchant, of the staple, and recognizances in the nature of the statute staple; and the same are also liable to satisfy all debts due on recognizances at common law, only with this difference, that in the former cases both body, goods, and lands, being all due, the conusee may take all at once, or different times; so that if he extends

extends the lands first, he may afterwards take the body; whereas upon the recognizance at common law, if the conusee sues an *elegit*, he can have no *capias* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land.

4. What Provision the Law has made for Tenant by Statute Merchant, &c. in case of Eviction.

By the common law, after a full and perfect execution had by extent, returned and entered on record, the conusee could have no new re-extent on the effects of the conusor, because there was once satisfaction given to the creditor on record, though the lands had been recovered from him before he had levied the debt out of them. The severity of this law was laid aside in Henry VIII.'s time; for in the 32d year of his reign it was enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and by a favourable construction of the statute, his (a) executors) may have a *scire facias* out of that court where execution is first awarded, or out of any court where the record shall be moved by writ of error and affirmed; but this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt *in presenti*, or *in futuro*, for the whole or for part, there he can have no aid nor benefit of this statute.

32 H. 8.
c. 5.

(a) 8 Co.
Lit. 290.

As, if all the lands extended but one acre be recovered from the conusee, he shall have no advantage of this statute, because the act relieves those conusees only who are clearly without remedy, which the conusee cannot be said to be in this case, where he has one acre left him, though it be but a poor remedy.

Co. Lit. 289.

If A. be bound to B. in one statute, and to C. in another, and C. first sue execution, and extend the lands, and afterwards B. extend and take the lands from C. as by law he may, because his statute is prior, C. shall have no benefit of this statute, though he has not one acre left him, because he hath a remedy *in futuro*; for after the extent of B. is ended, he shall re-enjoy the lands by force of the former execution: so, for the same reason, if the wife of the conusor recover dower against the tenant by execution, he hath no relief from this statute.

Co. Lit.
289. b.
4 Co. 67.

If a lessor oust his lessee for years, or disleise his tenant for life, and then acknowledge a statute, and the conusee sue execution; if the lessee in either case re-enter, the conusee is not relieved by this act, because he has a remedy *in futuro*, viz. after the death of the lessee, or the lease ended by holding over.

Co. Lit. 289.

If tenant in execution, by recognizance at common law, or by statute merchant, &c. be disleised, he may, by the express words of the statute, have an assise of novel disseisin also; and if there be no assignment by the conusee in his lifetime, they shall go to the executor, being really but chattels, who in case of a disseisin shall have the same remedy the testator might have had by an equitable construction of the statute.

2 Inst. 296.
Co. Lit.
43. b.

Before

Before we consider in what cases these tenants by statute merchant, &c. can hold over the time of their extent, it is first to be observed, that the sheriff is to make a reasonable extent of the lands; so that computing the debt and value of the land, it will be easily known how long the extent is to continue, and when the conusor is to have his land again.

4 Co. 82.
2 Roll.
Abr. 478.

Here we must distinguish between the act of a stranger and the act of the conusor; for in case of a disseisin or any interruption by a stranger, the conusee shall not hold over the time of the extent, but is to have satisfaction for the injury done by action against the stranger: but if the conusor himself had given the tenant by execution any interruption, or hindered him from taking the profits, there, the tenant might either hold over, or have an action against the conusor; for, as in the first case, it would be unreasonable to punish the conusor for the act of a stranger, by keeping him out of his lands; so, in the last case, it would be equally unreasonable to permit the conusor, by any act of his, to turn the conusee out of the land before he has levied the debt.

2 Roll.
Abr. 479.

If land of a lessee for life, or years, be extended upon a statute, and afterwards part be recovered in an action of waste, for waste done by the conusor before the extent, the conusee shall hold the residue over the time of the extent, because no act of the conusor's shall prejudice the conusee, or hinder him from levying his just debt out of the lands: but if the land had been recovered for what was committed by the conusee, there, he should not take advantage of his own wrong, and hold over to the prejudice of the conusor.

3 Co. 67.
2 Roll. Abr.
478-9.

So, if tenant in execution either suffers the land to lie waste, or neglects to levy the debt out of it, or if he makes a conditional surrender of the land to him in the reversion, and enters for the condition broken; these are all his own wilful acts; and it is but reasonable he should suffer for them, and not hold over the land to the prejudice of the conusor.

4 Co. 82. b.
2 Roll.
Abr. 478.

But on the other hand, where there is no default or negligence in the conusee, but he is prevented from making the usual profits of the land by the act of God, as, where the land is surrounded by water, or rendered unprofitable by wild-fire, there, the conusee shall hold over the time of the extent; for it would be unreasonable to punish the conusee for what he could by no industry or possibility prevent.

7. The several Ways of vacating and discharging these Statutes, and this either before or after Execution.

As we find that both body, goods, and lands are liable to execution, and the conusee may, at pleasure, take one or all by one writ of execution, or all at different times by several writs of execution, we shall consider,

1st, What acts of the conusee will discharge the land, or suspend the execution of it for a time; and this either before or after execution sued.

2^{dly},

2dly, What acts of the conusee will vacate the statute, &c. by discharging both body, goods, and lands; and this either by cancelling the statute, or by defeasance, or release, which are equivalent to it; and herein of the *Audita Querela*, which is the proper remedy for the conusor, if execution be sued after such acts are preferred by the conusee.

3dly, In what cases the conusor may avoid and destroy the statute by entry or plea, and in what cases he is put to his *scire facias*.

As to the first point; if *A.* acknowledges a statute to *B.*, and afterwards another to *C.*, in this case *B.* is first to be satisfied, his statute being prior in time to *C.*'s; yet if *B.* accepts a lease for years from *A.* then may *C.* sue execution first, because *B.* by his acceptance of the lease, has suspended the execution of his statute during the term.

2 Roll.
Abr. 470.
Cro. Jac.
424. 477.

But if a conusee accepts a feoffment of parcel of the land from the conusor, the residue in his hands is still liable; for his body being still liable, whatever remains in his hands must be so too: But if the conusor had enfeoffed a stranger of the residue, then the conusee by his purchase of part, had discharged the whole land; for the conusor, by his purchase, has discharged that part of the land from being liable to the debt, since his own lands cannot in any manner be liable to his own securities; and having discharged a part of the land by his own act, it is a discharge of the whole, since such act of his has prevented the legal execution on the whole lands, in the manner the statutes have directed, and therefore to execute it on the other alienees is partial, and to execute it on himself, together with the other purchasers, is impracticable.

Plow. 72.
2 Roll.
471. Bro.
Statute
Merch. 42.
F. N. B.
104. Cro.
Eliz. 756.

Thus, if a conusee extends a rent-charge, and after purchases parcel of the land out of which it issued; this frees the whole rent from the statute; for, besides that the rent-charge is extinguished, and, consequently, can be no longer in extent, the conusee, by his purchase, though it had continued, has discharged it, for the whole rent was extended to answer the statute; and part of it being discharged by the conusee's own act, the remainder must be liable to the whole debt, which would be contrary to the extent, or else must be discharged.

Savil, 69.

If the conusor enfeoffs the father of the conusee of part of his land, and a stranger of the remainder of it, and, upon the death of the father, that part descends to the conusee; this descent, though before execution, discharges the whole land, and the stranger shall enjoy his purchase free from that statute; for since the lands are made liable, which were not so, to any executions at common law, the conusee must take the execution according to the statute, which in this case cannot be had, since he cannot lay any part of the debt upon the land, which he is owner of: therefore, not being able to take execution on the whole land, according to the statute, his remedy fails; and there can be, in this case, no provision of the common law in his favour.

2 Roll.
Abr. 47.

Bro. Statute
Merch. 25.
2 Roll.
Abr. 470.

If the conufor enfeoffs the conufee of all his lands, by this purchafe the conufee has difcharged the land from the extent, becaufe it would be moft abfurd to extend his own land to pay his own debt: but if the conufor repurchases the lands, he has revived the extent againft them; for the firft feoffment only difcharged, or rather fufpended, the execution againft the land, and left the body and goods ftill liable; and whilft the conufor is fubject to execution, fo long will all lands he purchases after the acknowledgment of this ftatute be fubject.

Plow. 72.

So, if the conufor, after the repurchase, had aliened to a ftranger, the conufee might fue execution againft him; for he purchafed them fubject to the incumbrance of the ftatute, fince they were chargeable in the hands of the conufor.

But all thefe acts of the conufee, which difcharge the land only, muft be underftood to be done before the execution fued. Let us fee in the next place, how far fuch acts will affect him after execution is fued, and we fhall find them not only to difcharge the land, but the body and goods alfo, as will appear by the following inftances:

2 Roll.
Abr. 477.
Plow. 72.
Bro. Statute
Merch. 42.

For where the body and lands of the conufor are in execution, and the conufee purchases the whole or parcel of the land; this difcharges not only the land, as in the precedent cafes, but the body alfo; for the lands are taken in execution as a real fatisfaction for the debt, and therefore, as in all other cafes of execution, are a difcharge of the body, which is but a pledge for fatisfaction: but thefe debts being prefumed to be mercantile, are therefore to be fatisfied as foon as poffible, that the merchant may attend his bufinefs; for which reafon the ftatute allows, that, where the real fatisfaction is had by the extent of the lands, yet the body fhall be a pledge, in order for a more fudden fatisfaction, if the money can be raifed: but yet if the real fatisfaction by the purchafe or defcent of the land be difcharged, as it muft be when the conufee cannot have it in the manner it was extended, (as the conufee cannot have in this cafe, fince he cannot have the term and fee-fimple in the land together,) it follows of courfe, that the body, which is only a pledge, cannot continue in execution, when that which was the real execution is difcharged in the hands of the conufee: fo, if the conufee furrenders part, or the whole land, this difcharges both land and body; for the body being only in execution, in order to oblige him the fooner to fatisfy the conufee, when he by any act acknowledges himfelf fatisfied, as he does by the furrender, the body muft confequently be fet at liberty.

2 Roll.
Abr. 477.

Thus, if the bodies of *A.*, *B.*, and *C.* be in execution, and the conufee come into court, and fay, that he will not have one of them in execution; if this be entered of record, it fhall difcharge every one of them: the reafon is, the debt being entire and chargeable on each of them, his acknowledgment of fatisfaction by this act of one of them, fhall, like a releafe, extend to all.

If *A.* and *B.* acknowledge a statute to *C.*, who takes their bodies, and the lands of *B.* in execution; if afterwards *B.* die, and his land in execution descend to *C.* the conusee; this discharges the body of *A.*

Bro. Statute
Merch. 15.
2 Roll.
Abr. 477.

If a conusor be lessee for life, and his body and lands be taken in execution, and the conusee, being in by the extent, commit waste, for which the reversioner recovers the land (as he well may, because the estate of the lessee, which was extended, was subject to the punishment of waste); this shall discharge the body of the conusor: *secus*, if the land had been recovered for waste done by the conusor; for then the body should not be discharged, lest the conusor by his act and wrong should free himself from the execution.

Bro. Statute
Merch. 15.
2 Roll.
Abr. 477.

The next thing considerable is, what acts of the conusee will vacate the statutes, by discharging body, goods, and lands, and this may be done,

1st, By cancelling the statute, as tearing off the seals, which are so essentially necessary, that without them the statute, like common specialties, is wholly void and useless.

2^{dly}, By defeasance, which may vacate the statute absolutely, or upon condition.

3^{dly}, By release, which is a solemn renunciation of a man's right by deed. But it may be demanded how these statutes, which have the force and solemnity of a judgment, can be avoided by acts of less notoriety than themselves, as these acts *in pais* must be confessed to be, which overthrows the established rule, *unumquodque solvi eo ligamine quo ligatur*? The answer to this is, that notwithstanding the release, &c. from the conusee, the statute still continues in force; but the law, with reason, construing all men's deeds most strongly against themselves, by these acts, precludes the conusees from execution.

But if the court, at the instance of the conusee, grants him execution, as they really ought, since nothing appears to them destructive of the statute; what remedy has the conusor? For after such release or defeasance he cannot stop the execution, because he has no day in court to plead this in bar; but his proper remedy in such case is by *audita querela*, which is a writ to set aside an unjust judgment, for some injustice which could not be pleaded in bar; for if it might, then it was the party's own fault not to plead it in bar of such unjust demand, which is not relieved by this writ, that proceedings might not be endless*.

F. N. B.
104.
2 Sid. 108,
109. Co.
L. t. 290.
Moore, pl.
693.
* *Qu.* If it
might not
be done
upon mo-
tion, a
much more
expeditious,
and much less expensive method?

The same query is applicable to many of the following cases.

And if, upon a *scire facias* on a recognizance at common law, the conusor is returned summoned, he shall never avoid it by *audita querela*, because the recognizance was upon condition, which he hath performed: for by the summons he had a day in court given him to plead the performance of the condition, which would have been sufficient to stop the execution; but if the sheriff had returned, that he found nothing whereby to summons the conusor, on which execution had been granted, then the conusor

2 Roll. Abr.
306. Cro.
Eliz. 4. 25.
Sid. 55.

might have an *audita querela*, and then the release of the conusee, or the performance of the condition, might well be suggested therein, because he had no day in court to plead them in bar of the execution.

Sid. 54.
Raym. 19.

If *A.* be tenant for life, remainder to *B.* his son in tail; *A.* enter into a recognizance, and die, *C.* bring a *seire facias*, and *B.* be returned heir and tertenant, and warned, but make default, he can have no *audita querela* to avoid this execution, because he had a day given in court to set aside the recognizance; and it was his folly not to appear when warned.

F. N. B.
104.

If *A.* enters into a statute to *B.*, and pays the money at the day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.*, in this case *A.* may relieve himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such, till the contrary appeared, which the conusor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee.

Roll. Abr.
313.

If the conusee of a statute, upon agreement with the conusor, delivers up the statute in lieu of an acquittance, and after sues execution, and the conusor prays a re-extent, because that the land was extended too low, and has it granted to him, he shall never avoid the extent by *audita querela*, because by his praying the re-extent he admits the statute good and executory.

F. N. B.
105.
2 Roll.
Abr. 307.

If a conusee of a statute gives a deed of defeasance to the conusor, and afterwards sues execution contrary to the form of the defeasance, the conusor may have an *audita querela*, because the defeasance precludes the execution, if the terms or condition of it be performed by the conusor; and the conusor may have the *audita querela*, though the condition be not performed according to the defeasance, if execution was sued before the condition broken, because the conusee extended before his time; and therefore the execution being unjustly sued must, consequently, be an injury to the conusor.

Moor, 811.
pl. 1097.
Trot and
Spauling.

In an *audita querela*, the case was this; the conusee gave a defeasance, that if he sued execution of the lands the conusor had in *Kent*, the statute should be void; the conusee, contrary to this defeasance, extended the land in that county; and it was adjudged this writ well lay, to avoid the execution and vacate the statute; for the defeasance was no way repugnant to the statute, because the conusee might still extend the lands of the conusor in any other county, and take his body and goods.

Cro. Eliz.
40. 551.
And. 133.
Roll. Abr.
313.
Co. Lit.
265. 291.
10 Co. 47. b.
2 Roll.
Abr. 470.

If the conusee releases to the tertenant all right, interest, and demands, together with all suits and executions, and afterward sues execution, the tertenant shall have an *audita querela* to set aside this execution; and this differs from the case of *Burrows* and *Gray* in *Cro. Eliz.*, for there the conusee released only all his right, interest, and demand to the tertenant, which was held not to be sufficient, because he had only a possibility, and no interest in the land before execution, and, consequently, could not release what he

he had not : but in the former case, though the conusee had no right to the land before execution, yet there are words sufficient to discharge the execution, since it is released by express words : and in the first case, the words of the release refer to the executions, suits, and demands upon the statute, which statute, since it was in being, the executions and demands upon it may be released at any time ; but in the other case the words *right, title, and interest* relate to the land, which the conusee had no interest in till execution sued, and therefore cannot release or transfer over what he had not : besides, in the first case, the conusee has released all suits, by which, says my Lord *Coke*, the execution is gone, because no common person can have execution without prayer and suit to the court.

Another method of avoiding executions is by *scire facias ad re-*
habendam terram : and this writ differs from the *audita querela*, for that avoids an execution unjustly obtained at first ; but the *scire facias* allows the execution just at first ; but shews, that the end for which it was granted being obtained, it ought of consequence to cease.

2 Roll.
Abr. 432.

If the conusor, after his land is extended, tender the money to the conusee, who refuses it ; or if the debt, with all costs and damages which the statute *de mercatoribus* allows, be satisfied from any casual profit arising from the land ; in these cases, the conusor is put to his *scire facias*, and cannot enter : but in case of an *elegit* on a recognizance at common law, when the conusee is answered his debt, by the perception of the certain and usual profits of the land, the debtor may enter, and is not put to his *scire facias* : yet in this case, if the creditor be satisfied by an accidental perquisite, there, the debtor cannot enter, but must have a *scire facias ad re-*
habendam terram. And the reason of these distinctions is, because, in the first case, the execution issues according to the direction of the statute, not only till the principal debt be levied, but all costs and damages arising by reason thereof ; and therefore, since the damages are not ascertained, the record will always oppose an entry, which is but an act *in pais*, and cannot be turned to the defeasance of a matter of record, till such damages are settled on record in the *scire facias* : but in the second case, when the debt is certain, and the value of the land ascertained in the extent, there, when such debt is paid by perception of such settled profits, there is no act on record to oppose an entry, and therefore an entry is lawful. But where the satisfaction arises from accidental profits, which do not appear in the extent, this then is still matter of record, in opposition to the entry, since such accidental profits do not appear in the valuation of the land settled by the extent on record.

2 Roll. Abr.
479, 480.
4 Co. 67.
2 Inst. 398.

If lands be extended on a statute, and the time of the extent expired, the conusor is to be put to his *scire facias*, because the conusee may have cause to hold the land longer than the time of extent, for he may retain it till he has received his costs of suit and reasonable expences, which the chancellor shall assess.

4 Co. 67.
2 Roll.
Abr. 479.

2 Roll.
Abr. 483.
[(a) But if
the conusee
be satisfied
by percep-
tion of the
profits,
though not
by the ex-
tended va-
lue, the
conufor may
be aided in
equity, and
may com-
pel the co-
nufee to ac-
count ac-
cording to
the real
value by
him receiv-
ed. 2 Ventr.
338. Hardr.
336.]
2 Roll.
Abr. 482.

No *scire facias* lies upon a general averment, that the conusee has levied the debt before the time of the extent expired, because this may happen by the conusee's industry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20*l.* *per annum*, but it is extended only at 10*l.* though by this computation it is evident the conusee might levy the debt before the time of the extent is ended; yet the conufor, upon an averment that the debt is levied, shall have no *scire facias* (a), because that would be contrary to the record, and the court is to judge of the value according to the extent, by which it appears the debt is not yet levied. But if the conusee has levied part by cutting wood, and has received the residue, as appears by an acquittance produced by him, in this case, he shall have a *scire facias*: the reason is, because the end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the court that they are answered, whether it be by perception of the profits, or otherwise, they grant a *scire facias* to avoid the extent, and reinstate the conufor in his former possession, since the end for which it was given is answered.

If the conusee has levied part of the debt, according to the extent, the conufor, upon tender of the residue *in court*, shall have a *scire facias* to recover the lands within the time of the extent; for here, it appears on record how much was due at first, how much was paid, and what remains due and in arrear; and the end of the extent being to satisfy the conusee of his just debt, whenever that appears to the court the extent shall cease. But if the conufor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the conusee; in neither of these cases shall the *scire facias* be granted, because it does not appear on record that the debt is paid.

2 Roll.
Abr. 482.

If the conusee of a statute for 100*l.* apportion the statute, and sues execution for the body and land, for several parts of it, in several counties; as for 20*l.* in *Kent*, 20*l.* in *Surry*, his body is taken in *London* for 20*l.*, upon tender of this 20*l.* in court, the conufor shall have a writ to the sheriff of *London* to set him at liberty; for this writ of extent was to take his body, &c. till 20*l.* not the 100*l.* was paid, and consequently, upon tender of the 20*l.* the sheriff has no power to keep him in prison. *Secus*, if the body had been taken before apportionment, for then it could not be discharged upon payment of 20*l.*, it being taken at first for the whole debt.

Roll. Abr.
304.
Cro. Jac.
424. 477.

If *A.* leases *Black-acre* for years to *B.*, and then acknowledges a statute to *C.*, and afterwards another to *D.*, then *C.* takes a lease of the reversion, and the rent from *A.*, by which he has suspended the execution of the statute during the term, and, consequently, laid the land open to the extent of *D.*, the second conusee, who sues execution; if therefore *C.* should extend the reversion and rent during his own lease, *B.* the lessee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, because

cause C. hath suspended the execution of his statute, the first in date, by the acceptance of the lease from the conusor.

If tenant in tail acknowledges a statute, and dies, the conusor sues execution against the heir, he may avoid it by assise, without being put to his *audita querela*: so, if a disseisor acknowledges a statute, and the disseisee enters, the conusee extends the land, the disseisee is not put to his *audita querela* to avoid the extent, because there is not the appearance of justice in this extent; the conusor having only a tortious and unlawful seisin of the land, and, consequently, no power to charge it.

[After an extent of a statute in one county, and a *liberate* returned and filed, the conusee may have an extent into another county, if the prayer for the second extent was entered at the time the first extent was taken out; otherwise not. Yet in this last case, a court of equity will relieve him; for the intention and agreement of the conusor is, that all his lands (be they in never so many counties) shall be bound by the statute; and, consequently, it would be most unreasonable to confine the conusee to the lands of the conusor in any one county; for this would be to defeat that security which the party himself had agreed to give, and had actually given.]

Oates v. Robinson, 1 Str. 461. Fort. 373. S. C. 2 P. Wms. 91.

(C) Of the several Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teste, and Return of such Writs.

THE form of judicial writs must be according to the approved precedents in those cases; and therefore, where on a writ of *elegit*, which was *ideo tibi precipimus quod bona & catalla* of the defendant, *qua habuit die iudicii predicti. redditu, deliberari facias*, omitting *& medietatem terrarum & tenementorum predictorum*, the sheriff extended the lands and goods, and delivered the moiety of the lands, &c. On motion, the court refused to (a) amend the writ, and held, that the party must take out a new *elegit*, the inquisition herein being without warrant, the sheriff having no authority by this writ to extend the lands.

Vide head of Writs. Cro. Car. 162. Walker and Richey. (a) Whether any of the statutes of jeofails extend to judicial writs, *vide tit. Amendment and Jeofail.*

Every writ of execution, in case of a common person, must bear teste in term-time, for being the process of that court in which judgment is given, they have no authority of awarding it at any other time: but original writs issuing out of Chancery may bear teste at any time, because that court is always open.

Co. Lit. 161. 2 Inst. 40. Latch. 11. 2 Jon. 150. Vent. 362. —But if a writ of execution

bear teste out of term, the sheriff is justifiable in executing it, for he is not judge of the validity of the process, provided the court, out of which it issues, has jurisdiction of the matter. 2 Salk. 700. pl. 4. —But though he is justifiable in executing such process, yet if he lets a person escape whom he arrested on a *capias ad satisfaciend.* which bore teste out of term, no action lies against him, for the writ was void. 2 Salk. 700. pl. 4. 2 Ld. Raym. 775. 7 Mod. 29. 11 Mod. 50. pl. 20. per Holt, Chief Justice.

But if judgment be entered as of *Hilary term*, the party may take out execution in the vacation following, by a writ teste the last day of the said precedent term; for having run through the whole course of a judicial proceeding, and his cause ripe for execution

Whether it can be averred that the writ did not issue till a day subsequent

quent to the
teste, vide
Lev. 173.
1 Sid. 271.

Lutw. 332. 2 Keb 33. 2 Burr. 966. — Where it appeared that an execution was levied before the judgment was signed, though after the first day of the term to which the judgment related, and after the teste of the *feri facias*, yet held naught. 2 Show. 474. pl. 490.

5 Co. 90.
Hae's case.
4 Co. 67.
(a) But a
capias in
mesne pro-
cess must be
returned,
for the end
thereof is

All writs of execution which are to be executed by the sole authority of the sheriff, such as a *capias ad (a) satisfaciendum, habere facias seisinam* or *possessionem, fieri facias, liberat. &c.* are good when duly executed, though (b) never returned by the sheriff; for the plaintiff has the effect of his suit, and there is nothing farther to be done on his part; and hence it is said, that an execution executed is the end of the law.

to compel the defendant to appear, and therefore, if the writ be not returned, the arrest is tortious. 5 Co. 90. a. Cro. Car. 447. (b) But if the party apprehends himself injured by an erroneous writ of execution, he may apply to the sheriff to return it, and if he refuses, an action on the case lies against him. Keb. 551.

5 Co. 90. a.
4 Co. 74.
2 Inst. 376.
Cro. Jac.
569. Cro.
Eliz. 584.
* Which see
infra.

But in case of an *elegit*, although it be a judicial writ, yet the sheriff must return it, for this is not to be executed by his sole authority, but by an inquest taken by him, according to the statute of *Westm. 2.* * therefore he must return the writ, that it may appear that he hath pursued the directions of the statute.

2 Salk. 700.
pl. 4.
Shirly and
Wright.
2 Id. Raym.
775.
7 Mod. 29.
11 Mod. 50.
pl. 20.

On this distinction it hath been held, that a *capias ad satisfaciendum* may be taken out, returnable the term next but one after the teste; for in this case the intervening term makes no discontinuance, it not being necessary, as in case of a *capias* in mesne process, that the defendant should have a day in court; for his cause is at an end, and he must be in prison, whether the writ be returned or not; whereas on a *capias* in mesne process, the party may be at great prejudice, by reason of the imprisonment in the mean time.

2 Jon. 200. So, if a *feri facias* issues to the sheriff of S. returnable on a common return day, and he at the day returns *nulla bona*, a *feri facias testatum* may issue the day following, to the sheriff of Kent, and execution by him shall be good; for though on mesne process there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court.

2. Of the *Elegit*.

(c) Viz. By
Westm. 2.
c. 18. or
13 E. 1.
c. 18.
2 Inst. 394.

An *elegit* is a judicial writ given by (c) statute, either upon a recovery of any debt or damages, or upon a recognizance in any court which had authority to take the same: the words of this law are, *Cum debitum fuerit recuperatum vel in curia regis recognitum, vel damna adjudicata, sit de cetero in electione illius qui sequitur pro hujusmodi debito aut damnis sequi breve, quod vicecom. fieri faciat de terris & catallis debitoris, quod vicecom. liberet ei omnia catalla debitoris (exceptis bobus & asinis carucae) & medietatem terrae suae quousque debitum fuerit levatum per rationabile pretium & extentum, & si ejiciatur*

exciatur de illo tenemento, habeat recuperare per breve novæ disseisinae, & postea per breve de redisseisina, si necesse fuerit *.

* Tenant by *elegit* has but a chattel.

2 Inst. 396. Yet he shall hold *ut liberum tenementum*; and he, his executor or administrator, shall have an assise. *Id.*

When a person has judgment in an action of debt, or any other action in which he has damages, and he chooses to take out execution by *elegit*, the entry is, *Quod elegit sibi executionem fieri de omnibus catallis & medietate terræ*, and from this election either to have a *fieri facias* or *capias ad satisfaciendum*, or this writ, it is called an *elegit*, the form of which being first given by this statute (for, as has been before observed, there was no execution against the lands of a debtor at common law) is, *Ac cum idem J. S. juxta statutum inde editum elegerit sibi liberari pro prædict. 20 libris omnia catalla & medietatem terræ ipsius J. D.*

2 Inst. 395.
Reg. 299.
Co. Lit.
189. b.

But though by this statute the lands of a debtor are made liable, as well as his personal estate; yet if the creditor takes out an *elegit*, and it appears to the sheriff, that there are goods and chattels (a) sufficient of the debtor's, to satisfy the debt, he ought not to extend the lands.

2 Inst. 395.
(a) But an *elegit* executed upon goods only, is not a *fieri facias*; for

a *fieri facias* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. Sid. 184. Lev. 92. Keb. 105. 261. 465. 556. 692. 1 Ld. Raym. 346.

Upon this writ the sheriff is to impanel a (b) jury who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquiry the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquiry in that court out of which the *elegit* issued.

(b) That it cannot be done by the sheriff without an inquest, for the words of the statute are *per rationabile pretium &*

extentum, which must be found such by the oaths of twelve men, is laid down and admitted in all the books which treat of this matter, as 2 Inst. 396. Co. Lit. 389. b. Dyer, 100. 5 Co. 74. a. b. &c. [But if there are no lands, the sheriff need not take or return an inquiry. Stonehouse v. Ewen, 2 Str. 874.]

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety (c) thereof to the plaintiff by (d) metes and bounds.

Cro. Car.
319. Sparrow and Matterlock,

so resolved, and that all the precedents were so. [(c) If he deliver more than a moiety, the execution is void. Patten v. Purbeck, 2 Salk. 563.] (d) If upon an *elegit* the sheriff deliver a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453. per Holt, Ch. Just. [If the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return. Hutt. 16.]

[But the sheriff does not now, as formerly, deliver *actual*, but only *legal* possession of a moiety of the lands; and in order to obtain *actual* possession, the plaintiff must proceed by ejectment (e); in which he must not only prove the judgment, and, by the judgment roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit* by a true copy thereof, and the inquiry thereon; for it is the *elegit*, and inquiry upon it, which carve out the term, and give the right of entry, the judgment roll being no more than a memorandum, that the *elegit* issued and was returned.]

Tidd's Pr.
754.
2 Eq. Ca.
Abr. 381.
3 Term
Rep. 295.
(e) Gilb.
Evid. by
Loft. 10, 11.
Runningt.
Eject. 117.

Lev. 160. If the sheriff, on an inquisition upon an *elegit*, returns the *des*
per Curiam, defendant to have twenty acres in *Dale*, and twenty acres in *Sale*,
 Earl of and delivers the twenty acres in *Sale* for the moiety of the whole,
 Stamford and Need- all is void, for he ought to deliver a moiety of the twenty acres in
 ham; but each vill, and this might be avoided in evidence in ejectment
vide Sid. brought for the lands.
 239. S. C.

[And it hath been adjudged that the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c., making in value a moiety of the whole. *Denn v. Earl of Abingdon*, Dougl. 473. 1 Burt. Pr. Exch. 289.]

Cro. Eliz. If *A.* and *B.* recover severally against *C.*, and *A.* sues out
 482. Huyt execution, and has a moiety of *C.*'s land delivered to him on an
 and Cogan. *elegit*, and then *B.* sues out an *elegit*, he can only have a moiety
 of the lands which remained with *C.* after the first extent, and
 not the whole delivered to him.

Hard. 23. But if *A.* acknowledges two judgments to *B.* and in the same
 &c. And. term he takes out two *elegits*, on the one he may have a moiety of
 27. The *A.*'s lands delivered to him, and on the other the other moiety,
 Attorney and it is not restrained to a moiety of a moiety, for in judgment of
 General and law the whole term is but one day.
 Andrews.

Gilb. Ex- [On lending money therefore, if the lender take two several
 ecut. 56. bonds and warrants of attorney, one for a part, and the other for
 the residue of the money, and enter up two several judgments
 thereon, of the same term, he may take the whole of the defend-
 ant's lands under them.]

Cro. Eliz. If, upon an inquest taken upon an *elegit*, the jury find that the
 584. party was possessed of a term, which commenced the 2 & 3 Ph. &
 Palmer and Mar., when in truth it commenced the 3 & 4 Ph. & Mar., and
 Humphry. the sheriff sells the term according to the value found by the jury,
 4 Co. 74. the execution is void, for the sheriff has only authority to sell or
 S. C. extend such things as are found to be the party's; but in this case
 the inquest finding one thing, and the sheriff selling another, the
 inquest does not warrant the sale.

Cro. Eliz. But if the inquest had found, that he was possessed of such land
 584. See for terms of divers years *adhuc rent.* which they had appraised at
 Gilb. Exec. so much, without shewing the certain beginning or determination
 35. thereof, it had been well enough; for they shall not be compelled
 to find a certainty, not having means to be informed thereof.

2 Inst. 395. Upon an *elegit* the sheriff may either extend a term for years,
 8 Co. 171. that is, may deliver a moiety thereof to the plaintiff as part of the
 Dalt. Sh. lands and tenements of the defendants, or may sell it absolutely
 157. as part of his personal estate.

Gilb. Exec. [If the term be extended, the plaintiff is accountable for all the
 35. 33. profits he receives out of the term, upon such extent; and if he
 receive the debt out of such term, before it expires, the defendant
 shall be restored to the term itself; but otherwise he shall keep the
 term, and not account for the profits of it.]

Moor, 32. Also it seems that a (*a*) rent-charge may be extended on an
 pl. 104. *elegit*, for the word *land*, which is made subject to the execution,
 (a) But a includes (*b*) all hereditaments extendible; and in this case the
 rent-seck party may distrain and avow for the rent, though the tenant never
 cannot be attorned;

attorned; for the law creating his estate gives him all means necessary for the enjoyment of it. delivered on an *elegit* as *liberum tenementum*. Cio. Eliz. 656. (b). But the office of seizer cannot be extended, for a man shall not have execution of that which he cannot assign, though he may have of this an assise, *ut de libero tenemento*. Dyer, 7. pl. 10.

Lands in ancient demesne upon an *elegit* may, by the sheriff, be delivered in execution, because the title of the land is not directly put in plea in the king's court. Hob. 47. 4 Inst. 270. 2 Inst. 397. Moor, 211. pl. 351. Brownl. 234.

By the statute 29 Car. 2. c. 3. the sheriffs may extend lands, tenements, &c. of which any shall be seised or possessed in *trust* for him, against whom execution is sued, of such estate as the trustee was seised at the time of execution sued.

But the statute of *Westm.* 2. c. 18. or 13 E. 1. c. 18. which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent. 3 Co. 9. Co. Cop. 149.

[An advowson in gross cannot be extended on an *elegit*, because a moiety cannot be set out by the sheriff, nor can it be valued at any certain rent towards payment of the debt. Gillb. Exec. 39. But *qu.* and see 3 P. Wms. 401.

Neither doth an *elegit* lie of the glebe belonging to a parsonage, or vicarage, or to the church-yard, for these are each *seolum deo consecratum*. Id. 40. Jenk. 207. pl. 36.

A question having arisen in the court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed interest beyond the penalty of a judgment, Lord Hardwicke was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but if the creditor does not take out execution against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law, the debtor cannot upon a writ *ad computandum* insist upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this court will give it him by obliging the creditor to account for the whole he has received, and as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal. And he said, he remembered very well, upon Serjeant Whitaker's insisting before Lord Chancellor Cowper, that this would be repealing the statute of *Westminster*, his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.] 3 Atk. 517. Ambl. 520.

3. Of the *Capias ad Satisfaciendum*.

This writ lay only at common law, in case of the king, (a) who by his prerogative might have execution of the body, goods, and lands of his debtor; but by the statute of (b) *Marlbridge*, c. 23. it is enacted, [(a) It lay only in actions of trespasses &c.]

et armis.
Hob. 56.]
(b) Enacted
52 H. 3.
which *vide*
explained,
2 Inst. 143.
That these
statutes in-
troduced the
capias,
which did
not before lie
2 Bullst. 63.

enacted, That if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands nor tenements where- by they may be distrained; then they shall be attached by their bodies, so that the sheriff in whose bailiwick they be found, shall cause them to come to make their account; and by the 25 E. 1. c. 17. it is accorded, that such process shall be made in a writ of debt and detinue of chattels, and taking of beasts by writ of *capias*, and by process of *exigent* by the sheriff's return, as is used in a writ of account.

in these cases, *vide* 3 Co. 11. 12. Co. Lit. 239. 2 Inst. 394. Godb. 290. 2 Leon. 85. Register 136.

Roll. Abr.
604. Cro.
Car. 240.
vide tit.
Escape.
Ca. *fr.* re-
turnable out
of term, not

On this writ the sheriff cannot take bail, nor can he return, that the party was rescued, for he may take the *posse comitatus*; and therefore if he returns, that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none.

void, though liable to be set aside on motion. 2 Burr. Rep. 1187.

4. Of the *Fieri facias* and *Levari facias*.

T. Raym. 346. On *elegit* goods may be delivered to the party, but not upon a *fieri facias* *.

* But the sheriff may sell for the real value to a friend of the plaintiff's in trust, and see *infra*.

(a) Co. Lit.
290. b.
3 Co. 11.

(b) But the
sheriff can-
not, by
force hereof,
meddle with
the debtor's
lands, so as
to sell or deliver them to the creditor in satisfaction of the debt, but may collect the debt out of the profits of the land, as the corn or grass growing thereon, or out of the rents payable to the debtor. Godb. 290. Plow. 441. a. Finch, 101. Comb. 470. & *vide* 2 Inst. 453. what shall be counted the issues of the land.

The *fieri facias* and *levari facias* are judicial writs which lay at the common law. The *fieri facias*, on which the goods and chattels of the debtor only could be taken in execution, took its name, as my Lord Coke (a) observes, from the words of the writ, *quod fieri facias de bonis & catallis, &c.*; but on the *levari facias* the sheriff was commanded *quod de (b) terris & catallis ipsius A. levari facias, &c.*

2 H. 7. 13.
Office of Ex-
ecutor, 87.

The sheriff, on these writs, cannot deliver a furnace annexed to a freehold in execution; for though the writs give the sheriff authority to levy the debt upon the goods and chattels of the debtor; and this is indeed a chattel; yet they do not give the sheriff any authority to break or disunite any thing from the freehold, which he cannot do unless particularly empowered by writ.

Dalt. Sh.
145.

3 Co. 15.
(c) But in
Comb. 391.
it is said to
have been

Nor has the sheriff, by force hereof, any authority to sell an estate for (c) life, which being a freehold can no more be affected by these writs, than any other estate of inheritance; but he may dispose of (d) leases for years, which are but chattels, be they of ever so long a continuance.

admitted, that since the statute 29 Car. 2. c. 3. an estate *per auter vie* may be sold by the sheriff on a *fieri facias*. (d) But if the sheriff on a *fieri facias* sells a lease or term of a house, he cannot turn the lessee out of possession, but the vendee, in such case, must bring his ejectment. 2 Show. Rep. 85. *per Cur.* [This must be understood of a forcible expulsion; for it hath been determined, that under a *fieri facias*, the sheriff may justify expelling the defendant peaceably, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. Taylor v. Cole, 2 Term Rep. 292.]

Also,

Also, on these writs the whole personal estate is liable to execution, except wearing apparel; but it hath been (*a*) held, that, if the party hath two gowns, the sheriff may sell one of them.

3 Co. 12.
(*a*) Comb.
356. *per*
Holt, Ch. Just.

[So, where there have not been sufficient effects of the defendant to satisfy the judgment, the court has ordered the sheriff to retain, for the use of the plaintiff, money which he has levied in another action at the suit of the defendant.]

Armithead
v. Philpot,
Dougl. 231.

But the absolute property of those goods must be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser; for he is obliged, at his peril, to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property of the goods is vested; and this it is (*b*) said shall excuse him in an action of trespass.

Keilw. 119,
120. Bro.
tit. Trespas,
99. [4th Term
Rep. 633.
641. 6th Term
Rep. 88.]
(*b*) Dalt.
Sheriff, 146.

Nor can the sheriff take in execution goods pawned or gaged for debt, nor goods demised or letten for years, nor goods distrained.

Bro. tit.
Pledges, 28.
Dyer, 67. b.
in margine.

In trespass the sheriff justified, that by virtue of (*c*) a *feri facias* out of the Exchequer for the queen's debt, he took the plaintiff's beasts, being *levant* and *couchant* upon the land of the debtor, and sold them for the queen's debt; and adjudged, that it was not lawful, for they were not to be sold as the goods of the debtor (*d*), but they might have been distrained for the queen's debt.

Cro. Eliz.
431. Hil.
37 Eliz.
2 Roll. Abr.
359. S. C.
(*c*) But the
cattle of a
stranger be-

ing *levant* and *couchant* upon the land of a person outlawed, may be taken by virtue of a *levari facias* for the king; for this writ commands the sheriff to levy this duty out of the issues and profits of the land, and these cattle being *levant* and *couchant* are issues; and were it otherwise, it would be in the power of the party, by agitating his land, to defeat the king of the benefit of the outlawry; but for this *vide* Salk. 395. Skin. 618. Comb. 469. Id. Raym. 305. Salk. 408. pl. 4. 5 Mod. 109. Carth. 441. Comyns, 51. pl. 34. 12 Mod. 173. Raym. 17. Hard. 101. (*d*) That as to this point it must be a mistake of the printer; for that the beasts may be taken, and not sold, is a contradiction. Skin. 619. But, as to the principal point, the case is good law, being on a *feri facias*, which gives the sheriff power to dispose of the goods and chattels of the debtor only. Comb. 470.

[And as the sheriff cannot take the goods of a third person, so, if the defendant becomes bankrupt, before the delivery of the writ to the sheriff, or, as it seems, before it is actually executed, the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued out or docket struck: for by Holt, C. J. if a writ of execution be delivered to the sheriff against *A.*, who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound by the delivery of the writ to the sheriff.

Tidd's Pr.
735. 1 Lev.
173. 1 Ld.
Raym. 252.
and see 2 Lq.
Ca. Abr.
381.

But if the sheriff seize and sell the goods, before he has notice of an act of bankruptcy, he is excused (*e*), and if he sell them after such notice, though he may be sued in *trover* (*f*), yet he is not liable to an action of trespass (*g*).

(*e*) 1 Bl.
Rep. 205.
2 Bl. Rep.
829.
(*f*) 1 Burr. 20. 1 Bl. Rep. 65. (*g*) 1 Term Rep. 475.

An execution taken out against the goods of a bankrupt after his certificate is signed, but before it is allowed, is good.

1 Term
Rep. 361.
and see 1 Bl. Rep. 400.

In an action against the husband, the sheriff cannot take under a *feri facias* goods vested in trustees before marriage, for the benefit of the wife.

Cadogan v.
Kennett,
Cowp. 412.
Jarman v.
2 Vern. 239.

Welloton, 3 Term Rep. 618. See Underwood v. Mordant,

In

Farr v.
Newman,
4 Term
Rep. 621.

In an action against an executor for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution.

Heydon v.
Heydon,
1 Saik. 392.
See Jacky
v. Butler,
2 Ld. Raym.
871. Pope
v. Harman,
Comb. 217.
Marriott v. Shaw, Com. Rep. 277. Fox v. Hanbury, Cowp. 449. Eddie v. Davidson, Dougl. 650.

In an action against partners, the sheriff must seize all their joint property, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.]

(a) Cro. El.
504. Thom-
son and
Clark, ad-
judged,
Lutw. 589.
S. P.

Upon a *fiery facias* the sheriff cannot deliver the defendant's goods to the (a) plaintiff in satisfaction of his debt; nor ought he to deliver them to the (b) defendant against whom execution is; but the goods are to be (c) sold, and in (d) strictness the money is to be brought into court.

(b) 2 Vent. 95. (c) Therefore if the sheriff on a *fiery facias* levies the goods, and pays the plaintiff with his own proper money; yet he cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. Noy, 107. Waller and Weedale, adjudged. Lutw. 589. S. C. citeo. (d) But if the sheriff pays the money to the party, it is good, and the court will allow of such return, because the plaintiff is thereby satisfied, although the writ run, *ita quod habeat eorum nobis*. 2 Show. 87. pl. 78. — But this is only by the permission of the court, and not by force of the law. 3 Lev. 203-4.

Comb. 452.
& vide
Carth. 419.
Ld. Raym.

But it hath been holden, that upon a *fiery facias* goods may be sold to the plaintiff, who sues out the writ, though not actually delivered to him *.

251. Salk. 320. pl. 4. 5 Mod. 376. 6 Mod. 292. 12 Mod. 126. where it is admitted to be the practice, to make a bill of sale of the debtor's goods to the plaintiff, & vide 2 Vent. 95. — * For since the statute of frauds, goods are bound by the delivery of the writ.

Cro. Eliz.
181. Mod.
188. S. P.
adjudged.
(e) That
this was
clearly so

If the defendant die after the execution awarded, and before it be served, yet it may be served upon his goods in the hands of his executor or administrator (e); for by the execution awarded the goods are bound, and the sheriff need not take notice of his death.

before the 29 Car. 2. c. 3. before which statute the goods were bound from the *teste* of the writ; but by this statute they are bound only from the time of delivery of the writ to the sheriff: but even since the statute, the execution seems good in this case, for the statute was made for the benefit of strangers, who might have a title to the goods between the *teste* of the writ of execution and time of the delivery thereof to the sheriff, and not for the benefit of the party, or his executors or administrators. Vide Comb. 33. 2 Vent. 218. Salk. 322. pl. 10.

Salk. 322.
pl. 10.
per Cur.

So, if the plaintiff die, the execution does not abate, and the sheriff may, notwithstanding, proceed in it, because the sheriff has nothing more to do with the plaintiff; for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder: besides, an execution is an entire thing, and cannot be superseded after it is begun.

5. Of the *Habere facias Seisinam* and *Possessionem*.

Bro. Seisin,
7. 14. 30.
Dalt. She-

The *habere facias seisinam* and *possessionem* are judicial writs, which (f) lie for the seisin and possession of lands and tenements: the

the first is in real actions, where the freehold is recovered; the last is founded on the (g) *ejectione firme*, in which the party is to be restored to the possession of his term of which he was ousted: The seisin or possession on these writs is usually performed by the sheriff, by delivering the party who recovers, a twig, bough, clod, &c. of the land; or if it be of an house, by delivery of the ring of the door, &c.

ant, after judgment, may enter or distrain before any seisin delivered to him by the sheriff, upon a writ of *habere facias seisinam*. Co. Lit. 34. b. (g) For the recovery of the possession in ejectment, *vide tit. Ejectment*.

riff, 254-5.
Perk. 42.
(f) But
wherever
the writ de-
mands land,
rent, or
other things
in certain,
the demand-

To a writ of *habere facias seisinam*, the sheriff cannot return, that another is tenant of the land by right, for of this there can be no issue taken between them, and the sheriff has nothing to do but to execute the king's writ. 6 Co. 52. a.

A man recovers several houses in an assise, and after the tenant reverses the judgment in a writ of error, and a writ issues thereupon to the sheriff, to put him in possession of those houses: in this case, though the tertenants are strangers to the recovery, and therefore ought not to be ousted without a *seire facias*; yet, if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the court, which he is sworn to obey, under the penalty of being fined, if he does not.

Roll. Abr.
663.

The same law in all cases, where execution is of a judgment wherein the demand is made of a thing certain: but if an execution is to be executed without mentioning any thing in particular, there, the sheriff, at his peril, ought to make execution of the thing in demand, otherwise he will be a disseisor, for he is obliged to take notice of the thing in demand.

Roll. Abr.
664. Floyd
and Bethel.

(D) Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he has not received entire Satisfaction on his first Writ, and this, either against the Party or Sheriff.

WHEN the plaintiff has judgment, he has it in his election to sue out what kind of execution he pleases; but he cannot regularly take out two different executions on the same judgment, nor a second of the same nature, unless upon failure of satisfaction on the first.

2 Roll.
Abr. 475.
Hob. 60.
2 Inst. 395.

Therefore, if the plaintiff, upon a judgment or (a) recognition at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land, which being entered upon the record, he is thereby estopped; and though he takes but an acre of land in execution,

Bro. Elegit,
15. Roll.
Abr. 896.
Hob. 2. 57.
2 Bulst. 97.
5 Co. 87.
Cro. Jac.
338. S. C.

6 Co. 46. execution, yet it is held a satisfaction of the debt, be it never so
 Godb. 181. great, because in time it may come out of it.

Lev. c2. Comb. 232. (a) But on statutes merchant, staple, and recognizances in nature of statutes staple,
 body, goods and lands, being all liable by the several acts of parliament that create these securities, the
 consuee may take all at once or at different times; so that if he extends the lands first, he may afterwards
 take the body. Hob. 60. 2 Roll. Abr. 475. [And if the defendant has no lands, and the goods are
 not sufficient to satisfy the plaintiff, he may have a *capias ad satisfaciendum* after an *elegit*. 1 Str. 226.
 2 Ld. Raym 1451.]

Hob. 2. But though the plaintiff cannot take out a second *elegit* after the
 Cro Jac. first is returned, executed, and filed; yet, if, upon the first, the
 339. Pl. 3. sheriff returns *nihil*, the plaintiff may sue out a second.

Lev. 92. So, where in debt on a judgment of 2000 l. the defendant
 Glascock and Morgan, pleaded, that the plaintiff had sued three several *elegits* on the said
 adjudged. judgment into several counties, on one of which the sheriff re-
 Keb. 465. turned, that he had levied of the defendant's goods 500 l.; on
 496. 546. demurrer it was adjudged, 1st, That this *elegit* being executed on
 692. Sid. the goods of the party only, the plaintiff was not precluded by his
 184. S. C. election thereof from any benefit he had at the common law, by
 and same any nice construction of the word *elegit* of the statute of *Westm.* 2.
 points ad- which intended to give a farther remedy than there was at com-
 judged; but mon law, and that the action well lay, otherwise the statute would
 there said, be a trap to catch, and not a remedy to help, persons to their
 that the debts. 2dly, That if, as objected, any lands were extended on
 court was the other two *elegits* which were not returned, the defendant
 divided, ought to have shewn it in pleading. 3dly, That after this levy
 whether the on the goods, he might extend the lands, and hold them till debt
 plaintiff could take out any new execution. paid.
 —But it is held by my

Lord Hobart, that if upon an *elegit* the execution be on the goods only, without any lands, and they ap-
 pear not to be sufficient, the party may have a *capias*, for it is in effect but a *feri facias*, though the
 word be *elegit*. Hob. 58.* — An extent is not avoided by omission of lands liable. Stat. 16 & 17 Car. 2.
 c. 5. § 2. — On a defect in the first execution, a new one may go by same stat. and 8 Geo. 1. c. 25. § 4.
 — So, a new execution shall go, on the eviction of land extended, 32 H. 8. c. 5. 8 Geo. 1. c. 25. § 4.
 — Or, on the discharge of a prisoner by privilege of parliament. 1 Jac. 1. c. 13.

Hob. 52, It was formerly held, that, if a person taken on a *capias ad sa-*
 &c. tisfaciendum died in execution, the plaintiff had no further reme-
 Foster and dy, because he determined the choice by this kind of execution,
 Jackson. which, affecting a man's liberty, is esteemed the highest and most
 Cro. Jac. rigid in the law.

136. 143. But now by the 21 Jac. 1. c. 24. reciting, "That forasmuch as
 Roll. Abr. 903. "daily experience doth manifest, that divers persons of suffi-
 "ciency in real and personal estate, minding to deceive others of
 "their just debt, for which they stood charged in execution, have
 "obstinately and wilfully chosen rather to live and die in prison,
 "than to make any satisfaction according to their abilities; to
 "prevent which deceit, and for the avoiding such doubts and
 "questions hereafter, be it declared, explained, and enacted, That
 "the party or parties at whose suit, or to whom any person shall
 "stand charged in execution for any debt or damage recovered,
 "his or their executors or administrators, may, after the death of
 "the person so charged, and dying in execution, lawfully sue
 "forth,

“ forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they, or any of them, might have had by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution.”

“ Provided, That this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements, or hereditaments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bonâ fide*, for the payment of any of his creditors, and the money, which shall be paid for the lands so sold, either paid, or secured to be paid, to any of his creditors, with their privity and consent, in discharge of his or their due debts, or some part thereof.”

[If a plaintiff consent to the defendant's being discharged out of execution upon an agreement, he cannot afterwards retake the defendant, although the security given by the defendant on his discharge should be afterwards set aside.]

Withey, 1 Term Rep. 557. Thompson v. Briflow, *Vigers v. Aldrich*, 4 Burr. 2482. *Jaques v. Barnes*, 205.

So, if the plaintiff consent to discharge one of several defendants taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake such defendant, or take any of the others.]

If *A.* has judgment against *B.* and he takes out a *capias ad satisfaciendum*, directed to the sheriff of *Middlesex*, who directs his precept to the bailiff of the liberty of the duchy *ad cap. B. ad respond. A.* instead of *ad satisfaciend.* and thereupon the sheriff returns *cepi corpus secundum exigentiam brevis*; though by this return the sheriff makes himself liable to the debt to the plaintiff, by not pursuing his authority, yet *A.* may take out a new writ of execution against *B.* for he never was in custody by virtue of the *capias ad satisfaciendum*.

So, if a party taken on a *capias ad satisfaciendum* escapes, or is rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatus*, yet the plaintiff may take out any new execution, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.

If on a *feri facias* all the money is not levied, the plaintiff may take out a new execution; but as such new execution must be grounded on the first writ, such writ must be returned, and must recite, that all the money was not levied on the first. But if on the first writ all the money had been levied, it need not be returned, for no further process was necessary.

If on a *(a) fieri facias* the defendant pays the money to the sheriff, he is discharged of the execution, and the plaintiff must bring his action against the sheriff.

ad satisfaciend. he pays the money to the sheriff, for that writ only empowers him to take the body. 2 Lev. 203. 2 Jon. 97. 2 Mod. 214. Taylor and Baker. — 2 Show. 139. pl. 116. S. P. adjudged bad. — *Secus*, if he had paid it to the plaintiff's attorney on record. 2 Show. 139. pl. 116. admitted, for

Vigers v.

Aldrich,

4 Burr.

2482.

Jaques v.

Barnes, 205.

Clark v.

Clement,

6 Term

Rep. 525.

Yelv. 52.

Wood and

Harburn,

adjudged.

for that would have been a payment to the plaintiff himself. So payment on *ex. fa.* to warden of Fleet bad. 1 Mod. 194.

2 Mod. 214. So, if the sheriff take (a) goods in execution by virtue of a *feri facias*, whether he sells them or not, yet, being taken from the party against whom the execution was sued, he may plead that taking in discharge of himself, and shall not be liable to a second execution, though the sheriff hath not returned the writ. And the reason is, because the defendant cannot avoid the execution, and he would therefore be in a very bad condition if he was to be charged the second time; and if the sheriff dies after the goods are taken in execution, his executors are liable to the plaintiff, for they have *quid pro quo*, and it is in nature of a contract raised by law.

(a) So, if the sheriff takes a bond from the party, this is a good execution, and the sheriff shall answer for the money. Keb. 551.

— But if there be an execution against *J. S.*, and he bring *gol.* part of the condemnation-money, to the sheriff, who refuses to take it, saying, the plaintiff in the action will not accept it, and thereupon *J. S.* desire the sheriff to keep the money till the plaintiff comes to town; if in this case the sheriff is robbed, *J. S.* must pay the money over again. 2 Show. 172. pl. 166. *vide tit.* Bailment.

Hob. 206. As therefore the defendant in these cases is discharged as to the plaintiff, hence it seems to be clearly agreed, that the plaintiff may maintain an action of debt against the sheriff; for though there is no actual contract between the sheriff and the creditor, yet the levying of the money creates a contract in law, which lays a lien on the sheriff; for otherwise the party would be without remedy.

2 Show. 79. Also it has been held, that an action lies even by an executor against an under-sheriff for money levied on a *feri facias*, as money received to the plaintiff's use, though before the return of the writ; for if the sheriff were permitted to stave off the action by his delay, in not returning his writ, it would be allowing him to take advantage of his own wrong.

2 Show. 79. So, it hath been held, that such action is not within the statute of limitations; for though it be not a matter of record till the writ be returned, yet it is founded upon a record, and hath a strong relation to it.

pl. 63. Cockram and Welbye. 2 Mod. 212. S. C. adjudged by three judges against *Scroggs*, Just. because the action was brought against the defendant as an officer, who acted by virtue of an execution, in which case the law creates no contract; and here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute. Mod. 245. Cro. Car. 267.

2 Saund. 47. And as the law subjects the sheriff to an action in these cases, so it (b) vests such a possessory property in him in the goods taken by him in execution, that if they are taken out of his possession, he may maintain trespass or trover against the wrong-doer, at his election, as well as a carrier or bailee of goods, and here he could not return a rescue, but must answer for them.

Wilbraham and Snow adjudged. (b) But if the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him, but they remain in the party, and are liable to any subsequent execution for his debt. 2 Vern. 238-9. — Where the sheriff pleaded, that he levied goods to the value of 16 *l.* and they were rescued out of his hands, and held an ill plea on demurrer. 2 Saund. 343-4.

Carth. 419, 420. Smallcomb v. If *A.* and *B.* have two several judgments against *C.* and they take out two writs of *feri facias*, which are both delivered to the sheriff

sheriff on the same day, and the sheriff executes that which was last delivered, it bearing teste before the other; and afterwards apprehending that he ought to have executed that which was first delivered, he takes the same goods and delivers them in execution on the first writ; this second execution is void; for though the sheriff ought to have executed the writ that was first delivered, yet having executed the last first, the vendee shall keep the goods, and the party must seek his remedy against the sheriff; and the reason hereof is, for the quiet of purchasers under sheriffs upon executions; for otherwise it would be dangerous to make such purchases of sheriffs; which might make writs of execution of no effect.

So, where a writ of *feri facias* is delivered to the sheriff to-day, and another to-morrow, and the sheriff executes the last first, by making sale of the goods, such sale will stand good, and the vendee shall hold the goods against him who first delivered the writ to the sheriff; and his remedy is only by action against the sheriff.

[But where two writs of *feri facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution. And if the person claiming under the second execution pay the sheriff the amount of the debt under the first execution, the court will not, on motion, compel the sheriff to refund that money.

second execution, that was holden to bind the sheriff. *Rybot v. Peckham*, B. R. M. 19 G. 3. cited *Ibid*.

If a *feri facias* be executed fraudulently, a second *feri facias* at the suit of another person executed afterwards shall have the preference.]

(E) Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.

Judgments must be executed in those courts in which they are given, and by such process and means as the law allows, and are agreeable to the established practice of those courts; and therefore, in case an inferior jurisdiction refuses to execute a judgment, a (a) writ of *adjudicatione judicii* lies, which if they disobey, the superior courts grant an attachment.

If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they must distrain him, and retain the distress till satisfaction.

Baron, S. C. but a *quare* made, for it is usual for the suitors assigned by the steward to tax the sums, Vol. II. 3 A and

Buckingham & al. v. Vicecom. London. Salk. 320. p. 4. S. C. Ld. Raym. 251. 5 Mod. 176. 6 Mod. 292. 12 Mod. 126.

Carth. 420. per Cur. See Stat. 29 Car. 2. c. 3.

Hutchinson v. Johnston, 1 Term Rep. 729. But where the sheriff had given a bill of sale to the person claiming under the 19 G. 3. cited

Bradley v. Wyndham, 1 Will. 44.

Cro. Car. 34.

(a) For this vide F. N. B. 42.

4 H. 6. 17. b. 22 Aff. 72. Roll. Abr. 543. S. C. Bro. Court

and then to award a *levari facias*.—By Brownl 8r upon a *levari* out of a court-baron, goods cannot be sold without a custom to sell, &c., and Noy, 17. 20.

2 Lev. 8r. But it hath been held, that execution may be in a hundred-
Doe and court by *levari facias*, and that where the books speak of a *dis-*
Parniter. *tingas*, they must be intended of a *levari*, for a distress infinite
12 Keb. 117. would be endless in an execution.
126. S. C.

—It is held, that, though the process of an hundred-court is a *distingas*, a *levari* may be good by custom. Comb.
121. Show. 47. 3 Danv. 304. (L.) pl. 1. 2 Lutw 1260. N. L. 40. Carth 53. —And in
3 Lev. 203. it is held, that the precept may issue from the sheriff, though the suitors are judges.

Tidd's Pr. [In actions on a policy of assurance, where there is a verdict
7:0. for the plaintiff against one of several under-writers, and the rest
1 Salk. 84. have entered into the consolidation rule, and agreed to be bound
Barnes, 58. by it; or where on a reference to arbitration, it is agreed that a
verdict shall be taken for the plaintiff's security, and an award is
afterwards made in his favour—in each of these cases, execution
cannot be taken out without leave of the court.]

Jones v. So, where in ejectment, the landlord is admitted to defend on
Edwards, the tenant's non-appearance, and judgment is thereupon signed
2 Str. 1241. against the casual ejector, with a stay of execution till further
order, the lessor of the plaintiff, having succeeded, must apply to
the court for leave to take out execution; and in such case, if a
writ of error be brought by the landlord, it may be shewn for
cause, and will be a sufficient reason against taking out execution.
(a) George v. Wilton, But if the landlord omit the opportunity of shewing it for cause,
2 Burr. 757. the execution is regular, and cannot be set aside (a).

Howell v. It seems to be proper, where there has been already an execu-
Harforth, tion in an action of debt upon bond for the payment of an annuity,
2 Bl. Rep. to apply to the court for leave to take out another execution for
843. Ogilvie subsequent arrears.]
v. Foley,
Id. 1111.

Vent. 274. If judgment is given in debt in *C. B.* and the record removed
3 Keb. 522. in *B. R.* by writ of error, and judgment affirmed (be it after *scire*
S. C. Sir *facias*, and appearance upon it, and errors assigned, or otherwise,) and execution awarded by *capias*, the *capias* ought to be special,
William reciting, that judgment was in *C. B.* and removed in *B. R.* by
Pucknal error, &c. for otherwise the *unde convictus est* in the *capias* shall
and Sell- be intended of a conviction in *B. R.* and this was said by the
wood. clerks to be their course; wherefore a *superfedeas* was awarded
of the execution *quia erroneè emanavit*, the writ not being re-
turned.

Salk. 321. If a writ of error be brought of judgment in *B. R.* in *Ireland*
Pl. 6. Coot here, and the judgment affirmed, the method is to have a writ,
and Lynch. reciting all the proceedings here in *England* directed to the judges
5 Mod. 421. of the King's Bench in *Ireland*, requiring them to issue process of
S. C. Ld. execution; and by this mandatory writ the cause is restored to
Raym. 427. that court; but no writ of execution of such a judgment can
12 Mod. issue here.
255.
Carth. 460.
Comp. 843.

[Where a writ of error determines in the Exchequer-chamber by abatement or discontinuance, the judgment is not again in *B. R.* till there be a *remittitur* entered; for without a *remittitur* it cannot

cannot appear to that court, but that the writ of error is still pending in the Exchequer-chamber (a): and therefore in such case, it is usual for the plaintiff to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution (b).

(a) 1 Salk. 261. 319.
1 Ld Raym. 264.
(b) 1 Salk. 265.
1 Cr. Pr. 369, 70.
2 Term Rep. 717.

So, if the plaintiff recover a judgment against two defendants in *B. R.* and one of them bring a writ of error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted, notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants.]

(F) Who are entitled unto, and may sue out Execution.

NO person is entitled to, or can sue out execution, who is not privy to the judgment, or entitled to the thing recovered, as heir, executor, or administrator to him who has judgment.

But if an administrator, *durante minori etate* of an executor, recovers in debt, and, before execution, the executor comes of age, executor shall have a *scire facias* on this recovery, for he is privy to the judgment.

Roll. Abr. 809.
Roll. Abr. 888-9.
Margaret Wright's case, adjudged.

So, if *J. S.* makes *A.* executor, upon condition, that if *A.* does such an act, that the executorship shall cease, and that then *B.* shall be executor; if *A.* recovers in debt, and then does the act, *B.* shall take out execution.

Roll. Abr. 889. Walwin and Herbert, by three judges against one.

If a feme, executrix to *J. S.* marries, and her husband and she bring an action of debt on an obligation, as executrix to *J. S.* and have judgment, and the wife dies; in this case the husband, though privy to the judgment, shall not sue out execution, for he is not entitled to the thing recovered, but the same belongs to the succeeding representative of *J. S.*

Roll. Abr. 889. Beaumont and Long adjudged.

So, where *A.* sued as administrator to *J. S.* on an obligation entered into by the defendant to the intestate, and had judgment, and afterwards the letters of administration were repealed; though *A.* was privy to this judgment, and took out execution thereupon, yet the court granted a *superfedeas* thereof, and held, that, the administration being revoked, the suing out execution afterwards was void; for the administrator had no interest or authority, but as a ministerial officer to the ordinary.

Cro. Cir. 208, 227, 464. S. C. Yelv. 83. Barnhart and Sir Charles Yelverton. 2 Sound. 148-9 S. P. adjudged between Turner and Davis, for

if he were permitted to sue out execution, he would, notwithstanding, be subject to the rightful administrator, which would create a circuitry of action, which the law abhors.

Also, it was formerly held, that if an administrator had judgment in right of his intestate, and died before execution, that the administrator *de bonis non* could not have a *scire facias*, so as to take out execution on this judgment, not being privy to the record.

Cro. Jac. 4. Yate and Gough, adjudged by three judges against

Gaudy J. Yelv. 83-4. S. P. per Cur.

55d. 29.
Harrison
and Bowden.

But where an executor had judgment, and sued out an *elegit*, but died intestate before the debt was levied; yet it was held that the administrator *de bonis non* should take advantage thereof, and that the *elegit* being sued out, made it an interest vested, though it would have been otherwise if execution had not been sued out.

(a) For this
vide 6 Mod.
290. and
Salk. 323.
where it is
said *per Cur-*
iam to be

And now by the 17 Car. 2. c. 8. § 2. it is enacted, "That where any judgment, after a (a) verdict shall be had, by or in the name of any executor or administrator; in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

but reasonable, and within the equity of this act, that an administrator *de bonis non* should be permitted to perfect an execution begun by an executor or administrator, though the judgment was by default, &c. See 2 Ld. Raym. 1072. 11 Mod. 34. pl. 6.

Cleave v.
Vere, Cro.
EHz. 450.
457. Sir
W. Jon.
385.

[But in case of an extent, and inquisition had, the execution is not complete till a *liberate* is awarded; and if the plaintiff in the execution die before the *liberate* is awarded, the writ of *extendi facias* is abated by his death; and his representative cannot have any fruit thereon, because no right was vested by the extent.]

46 E. 3.
25. b.
Roll. Abr.
889. S. C.

If a man has judgment for the arrearages of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is entitled.

19 E. 4. 5. b.
43 E. 3. 2.
Roll. Abr.
889.

So, if the demandant in a writ of *cofinage*, or (b) other real action, in which land and damages are recovered, has judgment, and dies, the heir shall take out execution as to the land, and the executor as to the damages.

(b) So, of a
recovery in
waste, the heir shall have execution of the land, and the executor of damages. 43 E. 3. 2 Roll. Abr.
889. S. C.

48 E. 3.
12. b.
Roll. Abr.
889 S. C.

If a statute be entered into, to husband and wife, and the husband die, the wife shall take out execution.

But for this
Roll. Abr.
342. 889,
890.

So, if husband and wife recover lands and damages, and the husband die, the wife shall have execution of the damages, and not the executors of the husband.

Hob. 61.

If there are two executors who have judgment, and the one prays a *capias*, and the other a *feri facias*, it is said the *capias* shall be awarded, as being best for the testator.

Cro. Jac.
159. Doctor
Atkins v.
Gardener,
adjudged
without
argument.

If the president of the college of physicians brings an action against one for practising physick in London without licence, pursuant to the statute 14 & 15 H. 8. c. 5. and has judgment, and dies before execution; the successor, and not the executor of him who recovered, shall sue out execution; for this action is given to the president by an act of parliament, and the proceedings, and judgment thereupon obtained by him, were in his corporate capacity; and therefore the successor, on whom the law transfers the duty, shall take out execution.

(G) Of the Persons against whom Execution may be sued out : And herein,

1. Of suing Execution where there are several Parties concerned.

IF a man has judgment in an assise against any three for lands and damages, he cannot sue execution by *capias* against one only, for the damages; but the *capias* ought to be against all, for the execution ought to ensue the nature of the original.

15 H. 7. 6.
Roll. Abr.
838.
[That a
separate
capias ad

satisfaciendum against one, on a joint judgment against two, is bad, hath been lately adjudged. Clerk v. Clement, 6 Term Rep. 525.]

So, if a man has judgment in debt against two, he must take out joint execution against both, and (a) cannot have a *capias* against one, and an *elegit* against the other.

Roll. Abr.
888. Be-
verley and
Beverley.

For this *vide* Cro. Eliz. 573-4. 5 Co. 86-7. S. P. (a) *Vide* Hob. 2. 59. Cro. Car. 75.

But if a man have judgment for damages against two, and he sue out a *scire facias* against both; if one be returned summoned, and he make default, and it be returned, and the other have (b) nothing, the plaintiff may have execution against him who made default for the whole.

1 E. 3. 13.
Roll. Abr.
890. S. C.
(b) So, if it
be returned
that one of
them is

dead, he shall have execution for the whole against the other. 1 E. 3. 13. b. Roll. Abr. 890. S. C.

So, if two become bail for J. S., and he be condemned, and there be judgment on *scire facias* against the bail, the plaintiff may take out execution against either of them, being severally as well as jointly bound.

Roll. Abr.
888. Dixon
and Adams;
but for this
vide head of Bail.

If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death, and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (c) common law, the charge upon a judgment being (d) personal survived, and the statute of *Westm.* 2. c. 18. or 13 E. 1. c. 18. that gives the *elegit*, do not take away the remedy of the plaintiff at the common law; and therefore the party may take out his execution which way he pleases, for the words of the statute are, *Sit in electione*: but if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (e) suggestion, or else by *audita querela*.

Raym. 26.
Eggar and
Smart Lev.
30. S. C.
Keb. 92.
123. S. C.
(c) So ad-
judged.
1 E. 3. 13.
pl. 41.
3 E. 3. pl.
37. & *vide*
29 Aff. pl.
37.
29 E. 3. 29.
(d) For the
difference
between

real and personal execution, and that a personal execution will survive, though a real one will not, *vide* 3 Co. 14. Yeiv. 209 Raym. 153. 2 Keb. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 2. Show. 402. Hoit, 1. pl. 2. Carth. 236. Salk. 261. pl. 1. (e) For this *vide* F. N. B. 166. 44 E. 3. 10. See Comb. 441. 5 Mod. 338. Carth. 404. Show. 405. Ld. Raym. 244.

2. Of suing out Execution against the Heir and Executor.

If there be judgment against one who has lands in fee-simple, or if such a one acknowledge a statute, and die, and his lands descend to his heir, * execution may be taken out against the heir,

But for this
vide tit.
Heir and
Ancestor,

vide but his body is protected; for it would be most unreasonable to
 Dyer, 81. subject the heir to the payment of his ancestor's debts, any farther
 pl. 62. 207. than to the value of the assets descended.
 pl. 15. 344.
 pl. 1. Moor, pl. 203. Co. Lit. 103. 290. — * See the stat. 3 W. & M. c. 14. § 5, 6. where exe-
 cution shall go against the heir, after an alienation of lands descended.

For this *vide* So, if there be judgment against J. S. and he die intestate, or
 head of Ex- having made his executor, a *fieri facias* may be executed of his
 ecutors and goods in the hands of the executor or administrator.
 Administra-
 tors, & *vide* Mod. 188. 2 Vent. 218. Skin. 257. pl. 4. 2 Show. 485. pl. 449. Salk. 322. pl. 10.

1 Cr. Pr. [Neither an *elegit*, nor a *capias ad satisfaciendum*, will lie against
 346. 3 El. executors, unless a *devastavit* be returned.]
 Com. 414.

3. Of suing out Execution against Infants.

Co. Lit. By the (a) common law, if judgment be given against a man for
 290. a. debt or damages, and the defendant die before execution sued, his
 Roll. Abr. heir within age is not liable to execution during his minority; but
 140. the parol must demur in such case till he comes of age.
 (a) But
 though upon
 a judgment in debt, or upon a statute or recognizance, there can be no proceeding against an infant at
 common law during his minority, yet there may in Chancery, and a sequestration may issue against
 his lands. 2 Chan. Ca. 163-4. — That the lands of one who enters into a statute merchant, staple,
 or recognizance, are not extendible in the hands of his heir, until he comes of age, *vide* Bro. Stat.
 Merch. 33. Co. Lit. 250. Moor, pl. 121. 2 3. Dyer, 239. Co. Ent. 12. *Vide ante*.

Co. Lit. And this privilege of infancy does not only protect the infant,
 290. a. but all others who are affected by the judgment; as if there be
 father and two daughters, and judgment be given for debt against
 the father, who dies, one of the daughters being within age, par-
 tition being made, the eldest shall not be charged alone, but shall
 have the benefit of her sister's minority, which puts a stop to the
 execution.

Co. Lit. So, if the consor of a statute merchant die, and his heir within
 290. a. age endow his mother, the land in dower shall not be extended
 Bro. Stat. during the minority of the heir.
 Merch. 33.
 2 Str. 1217. [But an infant seems to be liable to a *capias ad satisfaciendum*.]

4. Of suing out Execution against a Feme Covert.

Roll. Abr. If a person recovers in trespass against baron and feme,
 890. but for execution may be sued out against the feme after the death of
 this *vide* tit. her husband.
 Baron and
 Feme, and Cro. Car. 518. 526. 3 Keb. 205.

39 H. 6. 45. So, if a recovery be in an assise against them upon a disseisin,
 Roll. Abr. execution shall be against the feme after the death of her husband,
 346. S. C. as well for the damages as for the principal.

46 E. 3. 23. So, if in a *quare impedit*, damages be recovered against baron
 Roll. Abr. and feme to the amount of two years, and the husband die, the
 890. S. C. damages may be recovered against the wife.

2 Str. 1167. [In an action against husband and wife, they may both be taken
 1237. in execution; and the wife shall not be discharged, unless it ap-
 1100. 149. pear,

pear, that there is fraud and collusion between the plaintiff and her husband, to keep her in prison.] Say. Rep. 149.

5. Of suing out Execution against privileged Persons.

There can be no execution taken out against a member of parliament during privilege of parliament *. But for this writ tit. Privilege.

* For preventing delays of justice, by reason of privilege of parliament, see 10 Geo. 3. c. 30. which enacts, that suits may at any time be prosecuted in courts of record, equity, or admiralty, and courts having cognizance of causes matrimonial and testamentary against peers, and members of the House of Commons, and their servants. But the persons of members of the House of Commons are not to be arrested or imprisoned.

Also no *capias* can issue against a peer; for even in the case of a private person, at common law, the body was not liable to a man's creditors; and the statute of E. 3. which subjects the body, does not extend to peers, because of the sacredness of their persons; as also the law supposes, that persons thus distinguished by the king have wherewithal otherwise to satisfy their creditors. 6 Co. 52. Hob. 61. Cro. Car. 205.

6. Of suing out Execution against a Clerk, or one in Holy Orders.

If a writ of execution be taken out against a clerk in holy orders on a judgment obtained against him, or upon a statute staple, or recognizance in nature of it, which he has entered into; and the sheriff return, that he is a clerk, he ought to extend his lay fee and chattels, or return that he hath neither; but if he return, *quod clericus est beneficiatus nullum habens laicum feudum, sed quod beneficiatus est* in such a diocese, then (a) a writ of sequestration shall issue to the bishop to sequester the living. 2 Roll. Abr. 474. Roll. Abr. 891. 2 Inst. 472. Jenk. 207. (a) That the writ in this case is like a *fieri facias*, and the bishop is in

nature of a temporal officer or ecclesiastical sheriff, and may, as the sheriff in other cases, seize ecclesiastical things and sell them, and must return *fieri feci*, and not *sequestrari feci* upon this writ. Mod. 257. 2 Mod. 258. [He may also be called upon by rule to return the writ; and if he make a false return, will be liable to an action. Gilb. Exec. 26. 1 Salk. 320. 1 Ld. Raym. 265.]

[Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or, upon a proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon: for where a sequestration was made out, and not published whilst the writ was in force, but was stayed in the registrar's hands, by desire of the plaintiff's attorney, the court held, that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect, and must have been first satisfied, notwithstanding it was then returnable.] 3 Burn's E. L. tit. Sequestration.

If the consor of a statute merchant be a clerk within orders, by the statute 13 E. 1. the sheriff cannot take the body in execution; and if he return, that he is a clerk, no execution shall be granted to the sheriff to levy the debt *de bonis ecclesiasticis*, for his person 2 Roll. Abr. 468. Reg. Jud. 2. Bro. Stat. Merch 12. Co. Ent. 13.

person is protected by the letter of the statute, and the statute doth not subject the *bona ecclesiastica* to the execution; but in this case the conusee may have execution granted out of his lay fee.

Salk. 320.
pl. 5. Mose-
ley and War-
burton. Ld.
Raym. 265.

On a *feri facias* against a fellow of *Winchester* college, the sheriff returned *clericus beneficiatus nullum habens laicum feodum*, whereupon a *feri facias de bonis ecclesiasticis* issued to the bishop, who sent his mandate to the warden and fellows of the college to sequester his salary, and they refused; and it being moved in *B. R.* to know, whether the bishop might not compel them by ecclesiastical censures, the court thought that this was not an ecclesiastical constitution, the universities being only societies *ad studendum & orandum*, but said that a prebend is an ecclesiastical benefice; and in such case, if the prebendary have a sole distinct corps, it may be sequestered; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a sequestration, and therefore they left the bishop to do as he ought by law.

(a) 1 Cr. Pr. [It is said, that the writ of sequestration must be renewed every term (a): but it seems, that if the writ be laid and executed, before the day of the return, the mesne profits may be taken under it, after the writ is returnable, otherwise not (b).]
345.
(b) 3 Burn's
E. L. tit.
Sequestra-
tion. Tidd's Pr. 746.

(H) At what Time Execution may be sued out : And herein of the Necessity of a *Scire Facias*.

2 Inst. 471.
5 Co. 88.
Cro. Eliz.
416.
6 Mod. 288.

AT common law, in real actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *scire facias* issued to shew cause why execution should not be.

2 Inst. 469.
Carth. 30,
31.
Sid. 351.

But if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable by law on the judgment, because there was not a judgment for any particular thing in the personal action, with which the execution could be compared: therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and therefore the law allowed him no *scire facias* to shew cause why there should not be execution; but if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt, of which the judgment was an evidence, was discharged.

To remedy this, and make the forms of proceeding more uniform in both actions, the statute of *Wesim.* 2. 13 E. 1. §. 1. c. 45. gave

gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment was obtained. The words of the act are, *Quod ea quæ inveniuntur irrotulata coram eis qui record. habent, sive servitia aut consuetudines recognite, aut alia quacunque irrotulata, si recens sit cognitio, viz. infra annum, statum habeat conquerens illius recognitionis, & si forte a majore tempore transactio facta fuerit aut illa recognitio, præcipiatur vic. quod scire faciat, &c.*

It hath been doubted, whether a *scire facias* lay to revive a judgment in ejectment after a year and a day, either by the common law, or by force of this statute; for at common law this was looked upon as a personal action, and it was thought that the statute extended only to such personal actions in which debt or damages are recovered, and not to provide a remedy in this case, when at the time of making the act the possession was not recovered in this action: but it seems now settled and confirmed by daily practice, that a *scire facias* lies on a judgment in ejectment, for the words of the act are, *Sive servitia sive consuetudines sive alia quacunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law.

Here also it may be proper to distinguish between taking out execution on judgments and recognizances at common law, and on statutes merchant and staple; that on the first, *scire facias* after the year and day, is absolutely necessary; but as to statutes merchant, &c. the consuee may at any time sue execution on them, without the delay or charge of a *scire facias*.

The reason, why the plaintiff is put to his *scire facias* after the year, is because where he lies quiet so long after his judgment, it shall be presumed he hath released the execution, and therefore the defendant shall not be disturbed without being called upon, and having an opportunity in court of pleading the release, or shewing cause, if he can, why the execution should not go.

Also, it is said in *Salkeld*, that, if a judgment be above ten years standing, the plaintiff cannot sue a *scire facias* without motion in court; and if it be under ten, but above seven, he cannot have a *scire facias* without a motion at the side-bar; and a note is added, that if after such motion, and judgment revived by *scire facias*, the defendant die before execution, the plaintiff must sue a new *scire facias*, but may have it without motion, for the judgment was revived before.

But though the general rule be, that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet the rule must be understood with these restrictions.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *superfedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above; besides, while the cause is depending on the writ of error, the

Sid. 351.
2 Salk. 600.
pl. 8. Ld.
Raym. 669.

Co. Lit.
291. a.
2 Inst. 469.
F. N. B.
296. Bro.
Recogni-
zance, 17.

2 Inst. 470.
and admitted
to be the
reason in all
the cases on
this head.

2 Salk. 598.
pl. 3. per
Cur.

Cro. Jac.
364.
Yelv. 7.
15 H. 7.
16. b.
Roll. Abr.
899.
4 Leon. 197.
5 Co. 88.

cause

Carth. 236-7. cause is still *sub judice*, whether the plaintiff shall recover, or not, and the year for the execution ought to be accounted from the final judgment given.

6 Mod. 288. So, if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *seire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance.

Carth. 283-4. Seymour and Gren-
vill, & vide
Roll. Rep.
104.
3 Show. 235.
pl. 233.
Comb. 346. Also, if the plaintiff enters on the roll of the judgment, an award of an *elegit* of the same term with the judgment, and continues it down with *vicecomes non misit breve*, he may take out that writ at any time afterwards, without suing out any *seire facias*, though, upon debate of this matter, the judges at first inclined that the *elegit* should be actually taken out; otherwise, such an award as this might be entered at any time, paying only for the continuances, and the party thereby tricked out of the benefit which the law gives him of pleading any matter *post factum* upon the *seire facias*: but upon examination of several of the ancient practising clerks then in court, this appeared to have been the constant practice amongst them for many years; and therefore the court, considering the inconveniency of opening a gap to destroy so many executions, for this irregularity, and because the practice had prevailed so long, that it was become the law of the court, ordered that the execution should stand good.

Salk. 322. But if the defendant has been tied up by an injunction out of
pl. 9. Chancery for a year, yet he cannot take out execution without a
6 Mod. 288. *seire facias*, because the courts of law do not take notice of Chan-
S. C. Poth cery injunctions, as they do of writs of error: besides, in that
and Booth. case, it would be no breach of the injunction to take out
* This rule the execution within the year, and continue it down by *vic. non*
of a previous *fi. fa.* does misit breve, which cannot be done in the case of a writ of error,
fi. fa. does not hold, because that removes the record out of the court where the judg-
where the ment was; and therefore there can be no proceedings below till
defendant it be affirmed, and returned to the inferior courts.

hath himself effected the day; f. far from it, that the defendant's rule "to shew cause why such an execution should not be set aside," was discharged even with costs. 2 Bur. Rep. 660. — If a *fi. fa.* be sued within the year, and *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue without a *seire facias*. Str. 100. — If plaintiff gets judgment in the petty-bag, (or any court,) and is stayed by injunction, after year and day he cannot sue out execution without *seire facias*. 3 P. Will. 35. Barnes, 197. — If execution is not returned by the sheriff, or not filed, continuances thereon cannot be entered on the roll; and if they are, and thereupon a *ca. fa.* issues after the year, without *seire facias*, defendant shall be discharged out of custody, and plaintiff pay costs. 2 Will. 82. Barnes, 213. — The year shall be computed from the day of signing judgment to issuing the writ, not by the number of terms. Barnes, 177. Judgment, action on it, superseded for want of a declaration; *ca. fa.* after a year from the judgment with ut *seire facias* shall be set aside; for the *capias ad respondendum* will warrant continuance on the roll. Barnes, 206. — *Sci. fa.* must be in the same county where judgment or where execution is awarded. Barnes, 207.

(I) To what Time the Execution shall have relation, so as to avoid any Alienation by the Party :
And herein of the Statute of Frauds.

AS to lands, they are bound from the time of the judgment, so that execution may be of these, though the party aliens *bonâ fide* before execution sued out : so, of statutes merchant, staple, and recognizances, which also bind the lands from the time of entering into them.

Therefore, if a man has judgment for debt, or is confessee of a statute ; and the debtor, before execution sued, aliens by fine, and five years pass, yet the plaintiff may still sue out execution.

But here it is necessary to observe, that by the 29 *Car. 2. c. 3.* called the *Statute of Frauds*, reciting, that it had been found mischievous, that judgments in the king's courts in *Westminster* do many times relate to the first day of the term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation time after the said term, whereby purchasers find themselves aggrieved,

§ 14. It is enacted, " That any judge or officer of any of his Majesty's courts of *Westminster*, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record which he shall sign, which day of the month and year shall also be entered upon the margin of the roll of the record where the said judgment shall be entered."

Co. Lit. 102.
a. b.
8 Co. 171.
Sir Gerrard
Fleetwood's
case. Roll.
Rep. 77-8.
Mod. 217.
Chan. Ca.
268.

[This statute, it hath been resolved, is confined to purchasers, and does not apply as between the parties to the suit.

Therefore, if the defendant die in the vacation, judgment may be still entered after his death, as of the preceding term, when he was living ; and it will be a good judgment, at common law, as of that term, though execution cannot be sued out upon it against the representative of the defendant until it is revived by *scire facias*. 1 Salk. 87. 3 Salk. 116. 2 Ld. Raym. 766. 7 Mod. 2. 95. S. C. 2 Salk. 401. 7 Mod. 30. S. C. 3 Salk. 159. 3 P. Wms. 309. 2 Str. 882. Ca. temp. Hardw. 148. S. C. 6 Term Rep. 363. But then the roll ought to be brought in and filed, before the effoign day of the subsequent term. 1 Salk. 87. 2 Ld. Raym. 830. 6 Mod. 191. And it is said, that if judgment be signed in term time, and in the subsequent vacation, the defendant sell lands, and before the effoign day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser. 6 Mod. 191. *Tamen qu.* if the judgment be not docketed at the time of the sale. Tidd's Pr. 706.]

And § 15. it is enacted, " That such judgments, as against purchasers *bonâ fide*, for valuable consideration, of lands, tenements, or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail."

And § 18. it is enacted, " That the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll where the said recognizances are en-

"rolled, and that no recognizance shall bind any lands, tenements, or hereditaments, in the hands of any purchaser *bonâ fide*, and for valuable consideration, but from the time of such enrolment."

[Before this statute, the judgment bound the lands, and the docket was nothing more than an index to find it readily. Gilb. C. P. 165. But now it is deemed necessary, that the

judgment should be docketed in order to bind the lands: and if it be not docketted, 4 Str. 639. Barnes, 261, 2. or if there be a false docket, which is as none, Gilb. C. P. 165. 1 Wils. 61. 2 Str. 1209. S. C. though a right judgment, the purchaser or mortgagee will be safe; and in the latter case, the party must take his remedy against the attorney or officer for not docketting it truly. But *qu.* whether equity would not relieve against a purchaser with notice, notwithstanding the judgment be not docketted? See 7 Vin. Abr. 53. 2 Eq. Ca. Abr. 684. & 7 Vin. Abr. 54. If the judgment against a testator or intestate be not docketted, the debt is put on a level with simple contract debts, and the executor or administrator may, under the plea of *plene administravit* to an action of debt upon such a judgment, give in evidence the payment of bond and other specialty debts. Hickey v. Hayter, 6 Term Rep. 384.]

[To give effect to a judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*, it is required, that it should be registered: for by 5 Ann. c. 18. § 4. and several subsequent statutes, "No judgment, statute, or recognizance, (other than such as shall be entered into in the name and upon the proper account of his Majesty,) shall affect or bind any manors, lands, tenements, or hereditaments, in those counties, but only from the time that a memorandum of such judgment, statute, or recognizance, shall be entered at the register-office, in such manner as therein is directed.")]

6 Ann. c. 35. § 19.
7 Ann. c. 20. § 18.
8 Geo. 2. c. 6. § 1
& 18.

Co. Lit. 102. 2.

Here also we must observe a difference as to judgments which affect the lands of an ancestor, and those which affect the heir; for as to the first, the plaintiff shall not have execution, but only of that land which the defendant had at the time of the judgment, because the action was brought in respect of the person, and not in respect of the land.

Co. Lit. 102. b.
(a) That filing a bill in B. R. is as effectual

But if an action of debt be brought against the heir, and he alien, pending the writ; yet shall the land he had at the time of the (a) original purchased, be charged, for the action was brought against the heir in (b) respect of the land *.

for this purpose as an original writ. Carth. 245. (b) And therefore, if the ancestor devised away the lands, creditors, whose securities were inferior to judgments, had no remedy at common law, either against the heir or devisee. Abr. Eq. 149. But now by the 3 & 4 W. & M. c. 14. it is enacted, that all will concerning lands, or any rents, profits, term, or charge out of the same, whereof the deviser shall be seised in fee-simple, in possession, reversion, or remainder, shall be deemed to be fraudulent and void against creditors upon bonds or other specialties, their executors, administrators, &c. and such creditors shall have their actions of debt against the heir at law and the devisees jointly.—* Where execution shall go against the heir after an alienation of lands descended, *vide* 3 W. & M. c. 14. § 5, 6.

Hence

Hence it hath been adjudged, that if there are two creditors, *viz.* *A.* and *B.* of *J. S.*, whose heir is bound, and who has lands by descent, and *A.* files an original in *C. B.*, and hath judgment thereon, *Trinity* term 2 *Jac.* 2. by default, and thereupon a general *elegit* issues against all the lands of the heir, and a moiety thereof is delivered to *A.*, and *B.* on a bill filed in *B. R.* 1 & 2 *Jac.* 2. has a special judgment against the assets confessed by the heir, *Trinity* term 3 *Jac.* 2., though *B.*'s judgment be subsequent to *A.*'s, yet it appearing that his bill or original was filed before *A.*'s, the judgment shall have relation thereto, and therefore he must be first satisfied.

Carth. 245.
Gree and
Oliver.

Also in the above case it seems, that though *A.*'s judgment had been on an original actually filed before *B.*'s, that *B.* must have been preferred, because his judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the original, but binds only in common cases from the time of the judgment given.

Carth. 121.
246.

As to goods and chattels, the execution at common law had relation to the time of the awarding thereof, and therefore, if after the *teste* of the writ of execution, the defendant had sold the goods, though *bonâ fide*, and for valuable consideration, yet were they still liable to be taken in execution, into whose hands soever they came.

8 Co. 171.
Cro. Eliz.
174. 440.
2 Vent. 218.

But as this created some inconveniency with respect to trade, in making those goods still subject to execution, though in the hands of a person who came by them for valuable consideration, and without notice of any such execution; and as there was a farther inconveniency in making a writ of execution taken out in vacation, to have relation to the last day of the precedent term; for remedy hereof,

Mod. 188.
Sid. 271.

By the 29 *Car.* 2. c. 3. § 16. it is enacted, " That no writ of *fi fieri facias*, or other writ of execution, shall bind the property of goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and, for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same) indorse upon the back thereof the day of the month or year whereon he or they received the same."

[But neither before this statute, nor since, is the property of goods altered, but continues in the defendant, till the execution executed. The meaning of the words,

that no writ of execution shall bind the property but from the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution. 2 Eq. Ca. Abr. 381.]

[This statute protects only goods in the hands of purchasers where the goods are sold *bonâ fide*; for if the party die after the *teste*, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for this is not a change of property by sale, or for a valuable consideration.

Comb. 145.

So,

1 Ld. Raym. 252. But in such case, the sheriff shall not be made a trespasser by relation for any subsequent disposal of them; though he would be liable in trover. *Smith v. Milles*, 1 Term Rep. 475.

Cro. Car. 459. 1 Sid. 230. 2 Ld. Raym. 1073. 1 Salk. 322. (a) Noy, 73. 2 Ld. Raym. 1073. The sheriff deriving his authority from the writ, it hath been holden, that if the plaintiff die after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money. And if the plaintiff (a) has made no executor, or administration is not yet committed, the money must be brought into court, and there deposited until, &c.]

(K) Of the King's Precedency in Executions.

Hob. 60. 2 Init. 19. 2 Roll. Abr. 472. 8 Co. 171. 2 Roll. Abr. 156-7. IT hath been already observed, that the king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election.

And here we must observe, that the king's execution relates as to land to the time of becoming in debt to the king; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately or immediately from the king, when any debt was returned of any person, it laid the estate as liable to such debt, as if it had been a reservation on the first grant.

And as to debts not of record, they bind the lands from the time they are entered into; but this is by force of the statute 33 H. 8. c. 39. by which it is enacted, "That if any suit be commenced or taken, or any process hereafter be awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before any person or persons; and that our said sovereign lord, his heirs and successors shall have first execution against any defendant or defendants, of and for the said debts, before any other person or persons, so always, that the king's said suit be taken and commenced, or process awarded for the said debt, at the suit of our said sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons."

[*Rex v. Cotton*, Parker 172. 2 Vez. 288. But the above statute of 33 H. 8. extends to executions against personal property as well as against

As to the king's execution of goods, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at common law; for though by the 29 Car. 2. c. 3. "no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff;" yet as this act does not extend to the king, an extent of a later *teste* supercedes an execution of the goods by a former writ; because by the king's prerogative at common law, if there had been an execution at the subject's suit, and afterwards an extent, the execution was superseded till the extent was executed, because

because the publick ought to be preferred to the private property, and the rather, because the king is supposed by publick business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to (or runs against) the king; and if he was to be prevented of his execution, by another person's coming in before him, laches must be imputed to him, which the law does not.

If the king's debt be prior on record, it binds the lands of the debtor, into whose hands soever they come, because, as has been observed, it is the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were alienated in whole or in part, as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject.

[This statute of 33 H. 8. it hath been resolved, is not confined to bond debts only, but extends to all debts and executions at the suit of the king. But it is restrictive upon the old prerogative. and introductory of a new law, for *ita quod, so always that the king's suit, &c.* makes a condition precedent and a limitation. Hence, therefore, a judgment and execution, executed by *elegit*, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. And, in the case of an execution against personal property, if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed. Besides, in this case, the property of the goods is changed by the subject's execution, and no longer remains in the king's debtors. It will indeed be otherwise, if an extent come after a distress, or before a provisional assignment under a commission of bankrupt, for in neither of those cases is the property of the goods divested out of the owner.]

land, and restrains the prerogative within the limitation there prescribed. Parker, 261, 2.]

But for this *vide* 2 Roll. Abr. 156-7. Moor, 126. 3 Leon. 239, 240. 4 Leon. 10.

7 Co. 18. b.

Attorney General v. Andews, Hardr. 23.

Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Uppm v. Sumner, 2 Bl. Rep. 1251. 1294. Rorke v. Dayrell, 4 Term Rep. 402.

(L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.

THE sheriff or officer, who has proper authority to begin an execution, is compellable to proceed in the same *.

* As to his fees, see 23 H. 6. c. 9. 29 El. c. 4. 3 Geo. 1. c. 15. § 16, 17. 8 Geo. 1. c. 25. § 5. and 7 Geo. 3. c. 29.

Hence it hath been adjudged, that if a sheriff on a *fieri facias* seizes goods in his hands to the value of the debt, and pays part of the debt, and is discharged, without having sold the rest of the goods, or having returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *fieri facias*.

and there held contrary to the resolution in all the other books, that the sale was void, and that his authority ceased with his office; but *quod vide* 2 Sand. 47. Latch. 117.

Salk. 223. *vide* tit. Sheriff.

Cro. Jac. 73. Ayre and Aden. Moor, 757. S. C. Roll. Abr. 803. S. C. but in Yelv. 44. the S. C. is reported, and that his

Cro. Eliz.
440. Bou-
cher and
Wileman.

If a *feri facias* be delivered to an under-sheriff, 9 Nov. 34 Eliz. on which he levies part of the debt; and on the same day a writ of discharge be delivered to him, dated 6 Novem. yet if it be not proved, that he had notice of this discharge prior to this commencing the execution, he still remains under-sheriff, and liable to the plaintiff's action for the money levied by him.

Salk. 323.
(a) For
which vide
Thes. Brev.
90. 34 H. 6.
36. Rast.
Ent. 164.

As the authority of the old sheriff continues, so the law has provided a remedy to oblige him to proceed in the execution, which is by (a) *disfringas nuper vicecomitem*, which is, either to distrain the old sheriff to sell and bring in the money, or to sell and deliver the money to the new sheriff to bring into court.

—That the *disfringas*, which commands the new sheriff to distrain the old one to sell and bring in the money, is the most usual. 6 Mod. 299.

(M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.

Vide tit. At-
tachment
and Sheriff.

IF the sheriff refuses to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted.

Salk. 323.

So, if he executes the writ, and makes a false return, the party injured may have an action on the case against him.

7 Mod. 118.
6 Mod. 229.
Salk. 323.

If a *feri facias* be directed to the sheriff, and he return, that he levied goods to such a value, he must answer goods to that value; and in such case, if he return, that they remain in his hands for want of buyers, then a *venditioni exponas* shall be awarded; upon which, if he refuse to sell the goods, a *disfringas* issues to the coroner.

For this vide
Cro. Jac.
514.
Godb. 276.
2 Roll. Rep.
57.
Bridgm. 53.
Sly and
Finch. Cro.
Jac. 566.
Coryton and
Thomas. Cro. Car. 53. 2 Saund. 343.

But if to a *feri facias* the sheriff return, that he seized goods to such a value, and that they were rescued out of his hands; in this case, he makes himself liable to an action of debt, or a *scire facias* may be brought against him by the plaintiff, for the sheriff having levied the goods, he can have no remedy against the defendant: also, in this case, there can be no *venditioni exponas* to the sheriff, because by his own shewing it appears, that he has not the goods in his hands.

(N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.

5 Co. 91.
&c. Se-
maine's case.
3 Inst. 162.
Moore, 668.
Yelv. 28.
Cro. Eliz.
588. Dalt.

IT is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard the law has to every man's safety and quiet, and therefore protects them from those inconveniencies which must necessarily attend an unlimited power in

in the sheriff and his officers in this respect; and hence it is, that every man's house is called his castle *.

Sher. 350.
* In Trin.
T 1-G 3.

in the cause of Yates and others against Delamayne Esq. the court set aside an execution levied on defendant's goods, in his dwelling-house, because the officer forcibly broke into the house to execute the writ.

But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case hath the following exceptions:

1. That whenever the process is at the suit of the (a) king, the sheriff, or his officer, may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be.

5 Co. 91. b.
(a) That upon a *capias* *in ligatum*, though on mesne

process, and at the suit of the subject, the sheriff may break open any outward doors after demand and refusal. 2 Show. 87. pl. 78.

2. So, in a writ of seisin, or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently, the sheriff must have all power necessary for this end: besides, in this case, the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered.

5 Co. 91.

3. Also, this privilege of a man's house relates only to such executions as affect himself; and therefore if a *feri facias* be directed to the sheriff to levy the goods of A. and it happen that A.'s goods are in the house of B., if, after request made by the sheriff to B. to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house.

5 Co. 93. a.
Sid. 126.

4. Also, this privilege extends to a man's dwelling-house or out-house adjoining thereto, and therefore it hath been adjudged, that the sheriff, on a *feri facias*, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c.

Sid. 189.
Penton and Browne.
Keb. 693.
S. C.

5. So, on a *feri facias*, when the sheriff or his officers are once in the house, they may break open any (b) chamber-door or trunks for the completing the execution.

2 Show. 87.
pl. 78.
agreed per Cur. Cowp. 1.

(b) Q. Whether this must not be after request and refusal? Palm. 54.

6. So, if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door, for the enlarging and setting at liberty the bailiffs; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient: also, it seems, that, in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it.

Palm. 52.
White and Whitthine.
Cro. Jac. 555. S. C.
2 Roll. Rep. 132. S. C.

7. That if the sheriff, in executing a writ, breaks open a door where he has no authority for so doing by law, yet the execution

5 Co. 93. a.

is good, and the party has no other remedy but an action of trespass against the sheriff.

1 Ld. Raym. 725. [A seizure of part of the goods in a house by virtue of a *fiery facias*, in the name of the whole, is a good seizure of all.]

(O) Of the Offence of hindering or obstructing an Execution.

THERE were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the king's writs, which creating great inconvenience, the statute of *Westm. 2. c. 39.* hindered the sheriff from returning rescuers to the king's writ of execution, the words of which statute are, *Multoties etiam falsum dant responsum mandando, quod non potuerunt exequi preceptum regis propter resistantiam potestatis alicuius magnatis, de quo caveat vic. de cetero, quia huiusmodi responsa multum redundant in dedecus domini regis & coronæ suæ. Et quam cito sub-ballivi sui testificentur quod invenerunt huiusmodi resistantiam, statim (omnibus omissis) assump. secum posse comitat. sui eat in propria persona ad faciend. execution. Et si inveniat, &c.*

The judges construed these words to extend only to executions, and not to writs on mesne process, and that the sheriff was not obliged to carry the *posse comitatus* where the man was bailable, for they did not presume, that in such cases the king's writ would be disobeyed.

2 Inst. 454. The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it. Hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, *viz. a qua non deliberetur sine speciali precepto domini regis*; so that, notwithstanding the statute of *magna charta*, that none are to be imprisoned *sine iudicio parium vel per legem terræ*, this is one part of the law of the land to commit for contempts, and confirmed by this statute.

Salk. 321.
Pl. 7.
Kingdale
and Mann.
6 Mod. 27.
S. C.

But though the court will on affidavit grant an attachment against the party, whether he be the defendant or a stranger who disturbs the execution; yet where the sheriff delivered possession by virtue of an *habere facias possessionem* in the morning, and some hours after the sheriff was gone, and the party in possession, the defendant came and turned him out again; the court held, that if the plaintiff had been turned out immediately after he was put into possession, or while the sheriff and his officers were there, an attachment might have been granted, for this had been a disturbance to the execution, and a contempt, but being several hours after, they doubted: but it was agreed in this case, that the court might grant a new *habere facias possessionem*, if the first was not returned.

Cro. Car.
109.
Mynn and
Oughton,

Also, though the court will grant an attachment, yet if *A.* be taken on a *capias ad satisfaciendum* at the suit of *B.*, and rescued by

by J. S., B. may bring an action on the case against J. S. for the rescue, or the sheriff may have such action against the rescuer, because he is liable to B., but his being liable does not prevent B. from bringing his action against which of them he pleases.

vide tit.
Actions on
the case.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.

[IF the writ of *fieri facias*, &c. be irregular, the defendant may move the court to set it aside, and that the goods or money levied may be restored to him. A third person, whose goods are taken under it, may also move the court to have them restored: But if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial.]

Tidd's Pr.
748.

(a) If upon an *elegit* the sheriff delivers all the party's lands, or a third part, or more than a moiety, the extent is void: but in this (b) case, it can only be made void by (c) writ of error or *audita querela* (d).

(a) Sid. 91.
(b) Carth.
453.
(c) That an
irregular ex-
ecution may

be avoided in evidence in ejectment brought for the lands. Lev. 160. (d) But the court, it seems, would now set it aside on motion.

But if upon an *elegit* the sheriff delivereth a moiety of an house without metes and bounds, such return is ill, and shall be quashed for incertainty on (e) motion, without a writ of error or *audita querela*.

Carth. 453.
(e) May for
this be
quashed,
though it be
filed and

entered upon record, because it appears by the record to be void for incertainty, *per* Hale, Ch. Just.; but Wyld, Just. held, that it being entered upon the record, there was no avoiding it, but by writ of error. Vent. 259. & *vide* Vent. 274. 3 Keb. 522.

So, if a *fieri facias* be not warranted by the judgment upon which it is awarded, though the sheriff shall be (f) excused, yet it is merely void as to the party.

Vent. 259.
(f) Upon a
fieri facias

sheriff of the county of Bucks, who sold the goods of a poor man for 22*l.* 13*s.* 4*d.* the goods being well worth 50*l.* it appeared to the court, that the sheriff had prevailed with the jury to prize the goods at an under-value, persuading them it would be better for the poor man; whereupon they appraised them *ut supra*, and he delivered them to the plaintiff for the said sum. The court held, that it was oppression, and inquirable at the assizes by indictment, or punishable in the star-chamber; and commanded that the under-sheriff, being an attorney, should be brought before them. Cro. Jac. 426. Sayer, Sheriff of Buckingham's case.

[If a *fieri facias* be tested, or returnable, out of term, or, in an action by bill, if it be returnable on a general return-day, it is void, or at least erroneous, and may be quashed or set aside on motion, together with the proceedings that have been had under it. But a *fieri facias* may be amended (g), by adding or altering the teste.]

2 Salk. 700.
Davey v.
Hollings-
worth, Tr.
24 Geo. 3.
B.R. Tidd's
Pr. 727.

(g) 1 Will. 155. Say. Rep. 12.

Salk. 409.

Pl. 5.

3 Salk. 320.

Pl. 8.

Ld. Raym.

632.

12 Mod.

320. 396.

5 Burr 2631.

2 Bl. Rep.

1104. Doug.

41.

It has been held, that in trespasss against the sheriff, it is enough for his justification, to shew a writ. So it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ was returned, if returnable; but the bailiff need not, because it is not in his power. But in trespasss against the plaintiff himself, or a mere stranger, they cannot justify themselves, unless they shew there was a judgment as well as an execution, for the judgment may be reversed, and it ought to be at their peril, if they take out execution afterwards. But it seems, that if one comes in aid of the officer, at his request, he may justify as the officer may do: but such request or command of the officer is traversable.

Lev. 95.

Turner and

Felgate.

Raym. 73.

S. C.

(a) Where

an action

will lie for

taking out

execution on

a judgment

which the

plaintiff knows

to be satisfied,

wide Hob. 205.

206. [(b) But if the sheriff or officer incautiously join

in the same plea with the party, he forfeits his defence. 1 Str. 507.]

But for this

wide tit.

Error letter

(H), and

3 Lev. 312.

So, where a man had judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and restitution awarded, and afterwards the defendant brought (a) trespasss against the plaintiff in the first action for the taking of the goods; it was adjudged, that it well lay against the party, for by the vacating of the judgment it is as if it never had been, and is not like a judgment reversed by error. But in this case it was held, that no action would lie against the sheriff (b), who had the king's writ to warrant what he did.

If after a writ of error sued out, and bail put in, the plaintiff takes out execution, the court will grant a *superfedeas quia executio erroneè emanavit*.

(Q) To what the Party shall be restored when such erroneous Execution is set aside.

Roll. Abr.

778.

8 Co. 19.

143.

Cro. Eliz.

278.

Moor, 573.

Leon. 96.

3 Leon. 89.

Cro. Jac.

246.

Godb. 27.

IF upon his judgment the plaintiff takes out a *fieri facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not the term itself; for by the writ the sheriff had authority to sell; and if the sale may be avoided afterwards, few would be willing to purchase under executions; which would render writs of execution of no effect.

Coulf. 103.

Roll. Abr.

778. Cro.

Jac. 246.

Yelv. 179.

Brownl.

107, 108.

(c) That it

would be

otherwise if

sold to a

stranger,

vide Yelv.

108.

Brownl. 107.

But if the plaintiff takes out an *elegit* on his judgment, and the sheriff, upon this writ, delivers a lease for years, of the defendant's, to the value of 50 *l.* to the plaintiff *per rationabile pretium & extentum*, to have as his own term, in full satisfaction of 50 *l.* part of the sum recovered, and after the defendant reverses the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term on this writ, yet here is no sale to (c) a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored.

And for this reason, if personal goods were on this writ delivered to the party *per rationabile pretium & extantum*, upon the reversal of the judgment he should be restored to the goods themselves. Roll. Abr. 778.

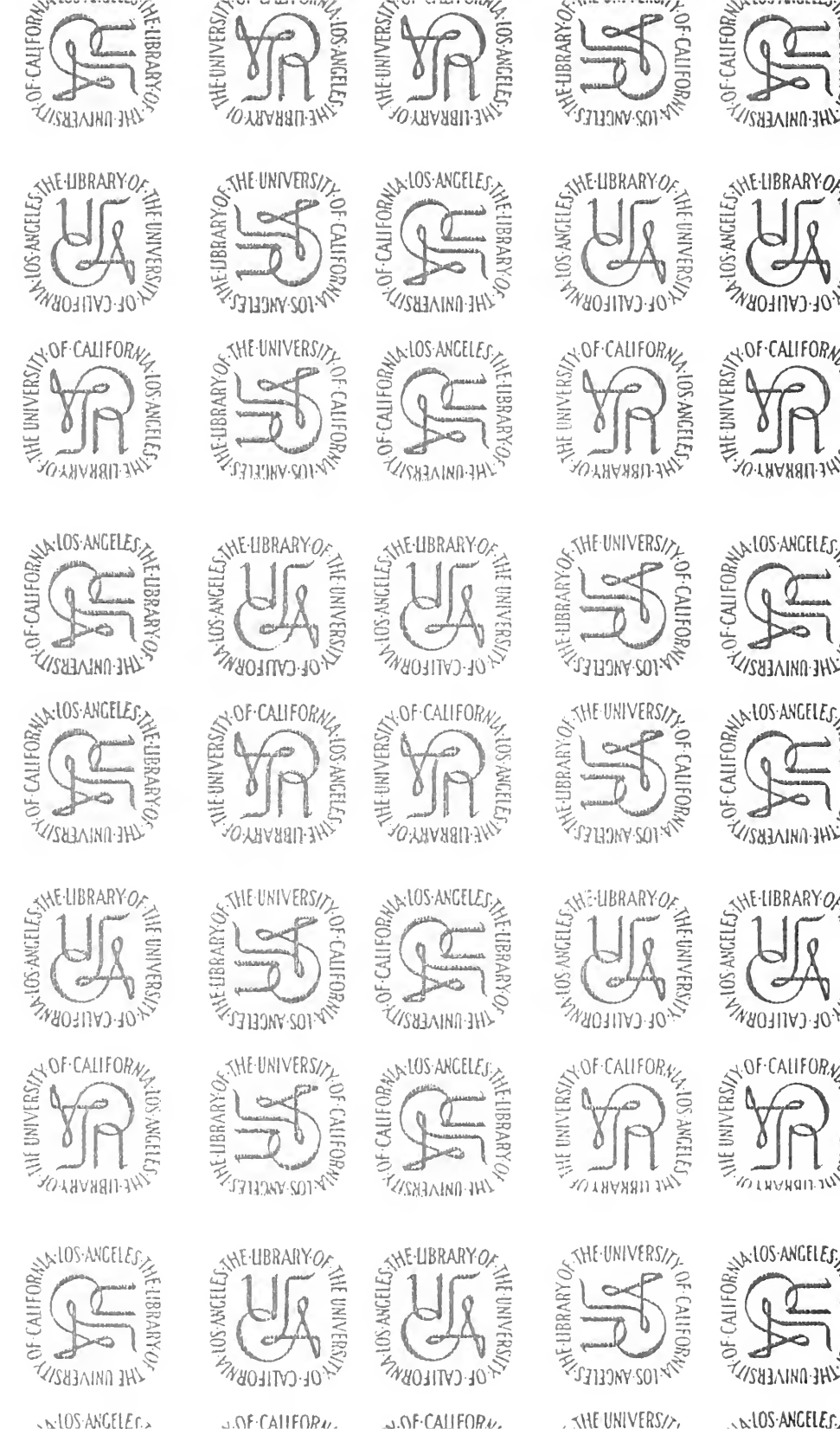
So, if the goods of an outlawed man are sold by the sheriff on a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king. 5 Co. 90. Roll. Abr. 778. Cro. Eliz. 278.

So, if upon a *feri facias* on a judgment against *B.* the sheriff takes the goods of *B.* into his hands, but before any sale of them, *B.* delivers to the sheriff a *superfedeas* on a writ of error, *B.* shall have the goods again, for by this seizure no property is altered. 2 Roll. Abr. 491. Sare and Shelton; but for this vide Roll. Comb 389.

Abr. 492. Cro. Eliz. 597. Moor, 542. Style, 159. Vent. 255.

END OF THE SECOND VOLUME.





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